



TO

The Honourable Sir Richard Garth, Kt.,
CHIEF JUSTICE OF HER MAJESTY'S HIGH COURT OF JUDICATURE
AT FORT WILLIAM IN BENGAL,

This Book

IS

WITH HIS PERMISSION

RESPECTFULLY DEDICATED.

PREFACE.

It is rather strange that there is no work on the Law and Practice relating to Vendors and Purchasers of Immovable Property in India. This, however, may be accounted for by the fact that many in the profession have no time to spare and few will take the trouble to collect the precedents into one point of view from "the wilderness of single instances"—the Case-law of India.

The plan and purpose of the treatise is to fill up this gap among the text-books on Indian Law. It is not meant to be anything more than a compilation for those who want to have a general insight into the Principles of the Law of Real Property so far as they concern the law and practice relating to Vendors and Purchasers. The author's principal aim has been to produce such a practical book as may be of use to law students and noviciates in the profession as well as to land-owners, capitalists and managers of zamindâries, who have constantly to deal in the sale, purchase or mortgage of estates and interests in immovable property. To obviate errors and imperfections in the exposition of the principles of the law on the subject, the author has used the *ipsissima verba* of the various learned judges who decided the cases to which reference is made, and has further given abstracts of a few of the leading English cases on conveyancing and equity for the convenience of readers. In addition to Indian cases, some decisions by the Privy Council and the House of Lords have been given to enable the reader to realise the extent to which the principles of English law and equity have been applied and adopted in the determination of Indian cases.

The comprehensive genius of Mr. Whitley Stokes has compressed the Law as to Sales of Immovable Property within the compass of nine or ten sections of the Transfer of Property Act, 1882. However invaluable the sections may be as

authoritative enunciations of some legal principles, they do not constitute the whole law on the subject ; and practical experience in Court and Chamber will show the fragmentary character of the enactment. The main provisions of the Act have been referred to or embodied in the text, while a reprint of the whole Act with the author's annotations has been added as an appendix.

For the omissions and errors in the execution, the writer "throws himself upon the candour of the learned and liberal profession to which he has the honour to belong." The subject was an extensive one, and required far greater talents than the author can lay claim to, to treat it in an exhaustive manner ; but if he shall have succeeded in doing justice to the superior abilities of the eminent Indian Judges whose names appear almost in every page, he shall in some measure have attained the object of his wishes. Whether the author is deceived in his expectations as to the utility and necessity of such a work or as to his own capacity in undertaking it, he must leave the impartial public to judge ; but in submitting it for the indulgent support of lawyers and laymen, the reader need hardly be assured that the author has been actuated by a sincere desire that it may prove useful to both, and that whatever its defects and demerits may be, neither time nor trouble has been spared to make the book as complete in its kind as the present state of Indian case-law allowed.

The writer's obligations to various authors for assistance derived from their labours are acknowledged in the foot-notes. The reader's attention is drawn to the head-notes of every page.

70, BUTTON SIKKAR'S GARDEN STREET, }
CALCUTTA, THE 31ST OF JUNE, 1883. }

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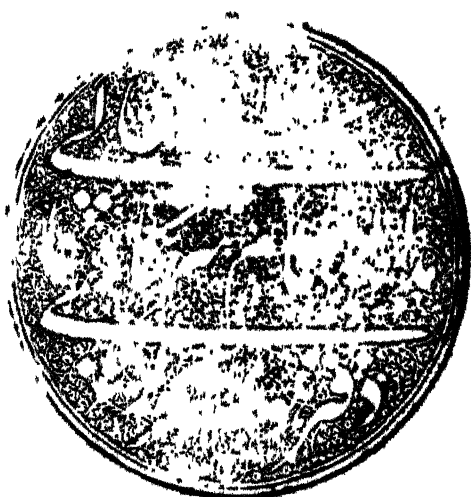


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ADDENDA ET CORRIGENDA.

- Page 6 to foot-note (l) add, See also observations of Pontifex J., in *Kasimunnisa Bibee v. Nilratna Bose*, I. L. R., 8 Cal. at p. 87.
- " 16, line 34, for "a British subjects" read "British subjects."
- " 18, to foot-note (f) add, "See post pp. 189—193."
- " 49, to foot-note (z) add, See post 364—66.
- " 54, to foot-note (p) add, see post 364—66.
- " 55, line 20, for "sheild" read "shield."
- " 68, 1 in foot-note (u) for "wasiatnnama" read "wasiatnāmā"
- " 69, line 28, for "On this" read "on his."
- " 78, line 24, for "Mitāksharāh" read "Mitāksharā."
- " 78, in foot-note (s) for "R. L. R., 410" read "8 R. L. R., 410."
- " 122, line 30, for "See also" read "so also."
- " 125, line 31, for "have been" read "has been."
- " 125, to foot-note (r) add see also *Nobin C. Roy v. Rup Lall Dass*, I. L. R., 9 Cal., 377.
- " 131, line 11, for "iability" read "liability."
- " 139, in the head-note for "desparagement" read "disparagement."
- " 140, in foot-note (l), for "suit No. of 1879" read "suit No. 641 of 1877."
- " 155, line 7, for "a purchaser" read "the purchaser."
- " 164, in the marginal-note strike out "admission in other suit when evidence."
- " 236, line, 24, for "shat" read "that."
- " 254, line, 23, for "treatd" read "treated."
- " 256, line, 5, for "uprchaser" read "purchaser."
- " 267, in foot-note (n) for "M. I. A., 344" read "6 M. I. A., 344."
- " 273, for (o) in the body read foot-note (p), for (p) in the body read foot-note (o).
- " 275, to foot-note (z) add, see also *Ram Chunder Poddar v. Haridas Sen*, I. L. R., 9 Cal., 466.
- " 308, line 3, for "i execution" read "in execution."
- " 363, to foot-note (m), add, See also *Ram Chunder Poddar v. Haridas Sen*, I. L. R., 9 Cal., 463.
- " 407, line 15, for "declarsd" read "declared." [ante, p. 255.
- " 438, to foot-note (r) add, See observations, of Macpherson, J.,
- " 451, line 12, after the word "nullity" add (g).
- " 483, to foot-note (n) add, Act I of 1877, sec. 27, illus to (e).

THE
LAW OF VENDORS AND PURCHASERS
OF
IMMOVABLE PROPERTY
IN
British India.

CHAPTER I.

OF LAND TENURES IN BRITISH INDIA.

PROPERTY in this world is of two kinds, immovable and movable ; and, in the laws of purchase and sale, both are called vendible property (a)

IMMOVABLE PROPERTY includes land, buildings, rights to ways, lights, ferries, fisheries, or any other benefit to arise out of land, and things attached to the earth, or permanently fastened to anything which is attached to the earth, but not standing timber, growing crops, nor grass. (b) The General Clauses Act, 1868, defines "immovable property" to include land, benefits to arise out of land, and things attached to the earth, or permanently fastened to anything attached to the earth. The Indian Succession Act, 1865, gives almost the same definition, but substitutes the words "incorporeal tenements" for "benefits to arise out of land."

Private property in land has existed in many parts of India from time immemorial, but it was never so freely transferable from hand to hand as it is now under the British Rule. The

(a) Narada's Institutes by Dr. Jolly, p. 70.

(b) Act III. of 1877. The Indian Registration Act 1877.

exhaustive enumeration of the various tenures of land in India is foreign to the subject-matter of this treatise. At the same time a succinct view of the principal land tenures would not be out of place in a work on the Law of Sales and Purchases of Immovable property in British India.

“The present distribution of tenures in the different provinces in India” says Sir George Campbell, “may be stated to be (speaking generally) as follows:—*Oudh* being at one extreme with an aristocratic system, which gives the land to nobles; *Madras* and *Bombay* at the other, with a system which gives the land to the people.

Oudh.—Great *Zemindars*, almost complete owners, with few subordinate proprietors, who own *sir* or *nankar* lands, or hold under *istmarari* leases.

North-West Provinces.—Moderate proprietors; the old ryots have fixity of tenure at a fair rent. The old proprietors, should they decline to pay an enhanced rate, are entitled to *Mulikānā*.

Punjab.—Very small and very numerous proprietors; old ryots have also a measure of fixity of tenure at fair rent.

Bengal.—Great *Zemindars*, whose rights are limited. Numerous sub-proprietors of several grades under them. Ancient ryots who have both fixity of tenure and fixity of rent. Other old ryots who have fixity of tenure at fair rent, variable from time to time.

The ancient “*Thāne Ryots*” of *Orissa* hold under a periodical settlement of 30 years.

Central Provinces.—Moderate proprietors. Ancient ryots who are sub-proprietors of their holdings at rents fixed for the term of each settlement. Other old ryots have fixity of tenure at a fair rent.

Madras and Bombay.—The ryots are complete proprietors of the soil, subject only to payment of revenue.” (c)

There are, however, numerous grants of the revenue due from particular tracts or plots of land, and to these revenue-free holdings only do the Mahomedans apply the term "*milki*," or property. They are very frequently granted by the ruler for the time being in terms importing perpetuity ; but being almost always assigned for some particular purpose—the support of a particular religious institution—for a particular service of some kind—or for the livelihood of a particular family—they may be considered as being property entailed and *inalienable*. (d)

In the case of *Hardiner v. Fell*, decided about 60 years ago by the Rolls Court in England, an estate held by a British subject at Burrisaul in Bengal, was declared to be " of the nature of fee-simple," and as such was held to be descendible to the Heir-at law.

Mr. Dart on " immovable property " in India.

Mr. Dart in his well-known work has only the following passages with regard to the transfer of immovable property in British India :—

" Except in Calcutta and those localities where land has been acquired and subsequently sold by the Indian Government, there does *not* appear to be any real estate in India which can be considered as held in *fee-simple* ; the ordinary English conveyances are however generally adopted in transactions between Europeans. By the 31st of the Acts of the Legislative Council of India for the year 1854 (but which only appears to cases governed by the English law) it is enacted that any estate or interest in immovable property situate in the territories in the possession or under the control of the East India Company whether in possession, remainder, or reversion, may in addition to any other mode of conveyance or release then valid, be conveyed, passed or released by a simple deed whether such deed operate under the Statute of Uses or not. By the same enactment, words of limitation in a deed are no longer requisite to pass an estate in fee simple ; and an estate limited to heirs is not to unite with a prior

(d) Systems of Land Tenure in Various Countries, p. 129. Madras Zamindaries are a species of entailed property.

life-estate in the same deed ; nor is a *bonâ fide* purchaser of property, the proceeds of which when sold are subject to a trust, in any case bound to see to the application of the purchase-money.

“ Our Courts will apply the general law of this country (being abstractedly just and not exclusively founded on any particular or technical rule) to questions relating to land in a colony where a different system of jurisprudence prevails; unless it is shown or suggested that the laws of the colony are different on the point in question.” (e)

All *maurusi* and *malrari* interests in land held by tenants of their landlord are analogous to *customary freeholds* in India. *holds* of England. (f)

Grants of waste or uncultivated lands in fee-simple have been made from time to time by the British Government to European settlers “on sufficiently favourable terms” in Assam, Cachar, Chittagong, and on the slopes and sub-montane districts of the Himalayas, and on the Nilgherres in Southern India. “The *bonâ fide* tea and coffee estates,” says Sir George Campbell in his Essay on the Land Tenures of India, “are held in fee-simple on payment of a very small price.”

(e) Dart on Vendors and P. 4th Ed., p. 485. See as to Real property in India, *Freeman v. Fairlie*, 1 M. L. A., p. 305 ; *Gardiner v. Fell*, 1 J. and W., 22 S. C., Pandit's P. C. J. Vol. I., p. 120.

(f) Customary freehold exists in many manors of North England. In the manor of Linstock, in the county of Cumberland, which is the property of the See of Carlisle, the custom of tenure (termed *tenant right*) is that the free-hold is in the lord, and the tenant holds of the lord, to him and his heirs for ever, according to the custom of the manor, at fixed rents and services. A fine is paid on every admittance. On alienation, a deed of bargain and sale is executed by the alienor to the alienee. The outgoing tenant surrenders to the Lord of the manor and the incoming tenant is admitted to hold under him. The surrender and the admittance are entered on the Rolls of the Court of the Manor. *Graham v. Jackson*, 6 Q. B., p. 811. Cf. Sec. 26, Act VIII. of 1869, B. C. Also Sec. 27, Act X. of 1859.

Section 1.—Of Transferable Interests in Land.

As a general rule, all estates and interests in land may be sold, unless a particular law or custom has prohibited the alienation thereof,—as for example in the case of *wagf* or *debutter* property.

Any really existing interest, however slight, is capable of being the subject of sale,—as for instance the right of a defaulting proprietor in his property, up to the time of its being alienated by a legal sale. (g) But regard must always be had to the rights of the vendor and to his *status*. Thus in the country subject to the Mithila law the sale of joint undivided property by one sharer is not valid without the assent of all the sharers. It is not valid even for the seller's own share, without the consent of his cosharers in the property. (h) Immovable property in India is governed by the personal law of its owner.

Perpetuities are always transferable, and the inferior like the superior tenures can be summarily sold for arrears of rent. Where there is a mere right of occupancy at the customary rates, the sanction of the superior holder is ordinarily required to a transfer by sale; but in some districts the Zemindars interfered so little, and were so glad to have the security for their rents afforded by saleable tenures, that the Ryots' tenures have become by custom entirely transferable, and the state of things is very similar to that prevailing in the north of Ireland. (i)

Under the system of land-tenures prevailing in Bengal, the transferable interests in land are of various descriptions:—

1st.—There are the proprietary interests created by Bengal Regulation VIII. of 1819—the *Patni*, *Darpatni*, *Sepatni* and

(g) S. D. 1856, p. 770; S. D. 1858, p. 840.

(h) S. D. 1853, p. 344.

(i) Systems of Land Tenure in Various Countries, p. 151.

so forth—interests in land perpetuated by a system of subinfeudation peculiar to Bengal Proper.

2nd.—Customary Kyâm Jotes or Makrari maurusi interests of Khoodkast tenants and other transferable *Shikmi* tenures.

3rd.—The seigniorship of the Zemindar on *Bastu* lands or land for building purposes or in the vicinity of a city or town. Such lands are called *purjote* in the Upper Provinces.

Colliceries, mines, quarries, pasturage, forest rights, *bunkar*, *phulkar*, and fisheries (*jalkar*) are incorporeal hereditaments, which are very often the subject of izara or conveyance.

A lease contained the following words :—" You shall continue to pay the sum of sicca rupees 5 fixed on the whole as ticca jumma of the said mouzah every year, and having cleared the villages of jungle, and having brought the lands under cultivation, yourself and through others, as usual, shall enjoy and occupy the same with your sons and grandsons in succession, &c." It was held that the lease conveyed an absolute interest ; and that the grantee and his heirs were entitled to transfer it ; and that a transferee, not an auction-purchaser, was not liable to enhancement of rent. (j)

The grantee of a *maurusi* lease (although he pays rents to the person who makes the grant in the perpetuity) is to be regarded *not* as a tenant for a term but as owner of the property conveyed on condition of paying a fixed sum annually to the former owner or his legal representatives. No rights are reserved save and except the annual rent and there is no reversion. The ownership of the land is intended to pass entirely to the grantee, and the interest created by the grantor is heritable, transferable and perpetual. The estate granted is what English lawyers call an Estate-in-fee. (k)

The Jummai rights of a Kurpha undertenant are not transferable without the consent of the Ryot landlord. A *Kurpha* is the undertenant of an occupancy Ryot. He is also called

(j) *Watson & Co. v. Joggeshur Attah, Marsh*, 330.

(k) Per MARKBY J. in *Banerjee v. Mukherjee*, I. L. R., 4 Cal. 330.

chukani in Rungpore, and *prajai* from *prajā*, and generally *shikmi* or *petao* ryot. These undertenants usually cultivate on terms of paying half produce. (l)

Purchases of rights of occupancy under Act X. of 1859 or under Bengal Act VIII. of 1869 cannot prevail in the absence of a clear well-defined local custom to that effect.

The right of occupancy acquired by a cultivating ryot under section 6 of Bengal Act VIII. of 1869 cannot be transferred either by voluntary sale or gift, or by a sale in execution of a decree. (m) In the case *Narendra Narayan Roy (Chowdhry v. Ishan Chandra Sen)* (n) decided by a Full Bench of five Judges of the Calcutta High Court presided by Sir Richard Couch, it was also held that if an occupancy ryot upon sale of his tenure ceases to hold and cultivate the land himself, then he might be considered to have abandoned his right and he cannot prevent the zemindar from ejecting him from the land.

Impartibility of an inheritance does not, as a matter of law, render it inalienable. The owner of an estate which descends as an impartible inheritance is not, by reason of its impartibility, restricted to making grants or gifts enuring only for his own life. The power of alienation resting upon the general law, inalienability, if existing, must depend upon family custom in this respect, and of such custom proof is required.

In *Anund Lal Singh Deo v. Maharaj Dheraj Gurnu Narain* (o) their Lordships of the Judicial Committee first held that the inalienability of a Zamindari was a matter to be proved; and this ruling has been approved and followed in the case of *Raja Udaya Aditya Deb v. Jadub Lal Aditya Deb*. (p) In this case of a titular Rāj, of which the lately deceased Raja in consideration of a

Inalienability of impartible estate, a matter to be proved.

The Putnam Raj case.

(l) *Bonomali Bajajur v. Koylash Chunder Mozoomdar*, 1. L. R., 4 Cal., 135.

(m) *Dwarkanath Misser v. Hurrish Chunder*, 1. L. R., 4 Cal., p. 920.

(n) 13 B. L. R., 274. S. C., 12 S. W. R., 22.

(o) 5 Moore's I. A., 82.

(p) 1. L. R., 8. Cal. p. 199.

bonus or fine had made a *Makrari* patta, or grant in perpetuity, of part of the zemindari lands thereto belonging, in favour of a younger son, it was found, that the only custom proved was that the raj estate descended to the eldest son to the exclusion of the other sons, and that there was no proof of a custom prohibiting such an alienation as that made by the grant. It was held by the Privy Council that the *makrari* grant was not invalidated by reason of the Raj estate being by custom impartible.

The Transfer of Property Act, 1882 enacts the following exceptions to the general law of alienability of all kinds of immovable property :—

(1) The chance of an *heir apparent* succeeding to an estate, the chance of a relation obtaining a legacy on the death of a kinsman, or any other mere *possibility* of a like nature, cannot be transferred.

Interests in immovable property which cannot be transferred.

(2) A mere right of re-entry for breach of a condition subsequent cannot be transferred to any one except the owner of the property affected thereby.

(3) An easement cannot be transferred apart from the dominant heritage.

(4) An interest in property restricted in its enjoyment to the owner personally, cannot be transferred by him. (q)

These exceptions do not affect any rule of Hindu, Mahomedan or Buddhist law to the contrary. (r)

It is doubtful whether under the Hindu Law, the sale of an expectancy is valid. (s)

In *Kali Chandra Chowdhery v. Shib Chandra Bhaduri* (t) where the Plaintiff's vendor was *not* the real owner in possession, but a person who was merely selling a possible title, the Judicial Committee did not decide the abstract question of law

(q) Act IV. of 1882. Sec. 6. Cl. (a), (b), (c) and (d).

(r) *Ibid.* Sec. 2. Cl. (d).

(s) *Mussamut Oodey Koonwer v. Mt. Ladoo*, 13 M. L. A., 585; S. C., 6 B. L. R., 283; Pandit's P. C. J. Vol II., p. 630.

(t) 6 B. L. R., 501. S. C., Pandit's P. C. J. Vol II., p. 621.

whether an expectant right can be made the subject of a sale among Hindus. But the judgment of the Privy Council in suit *Oodey Koonwar v. Mt. Ladoo* goes far to show that the principle of English Law which allows a subsequently acquired interest to feed, as it is said, the estoppel, does not apply to Hindu conveyances. (u)

Under the Mahomedan Law a thing must be *in esse* in order to be a subject of sale. A mere possibility cannot be sold.

Every Taluqdâr of Oudh has "a permanent, heritable and transferable right" in the estate comprising the villages and lands named in the list attached to the agreement or kabuliyat executed by such Taluqdâr, when settlement was made with him after the mutiny of 1857. (v)

In Bengal and the North-Western Provinces, the Zemindars, independent talukdars, and other actual proprietors of land, are privileged to transfer to whomsoever they may think proper, by sale, gift, or otherwise, their proprietary rights in the whole, or any portion of their respective estates, without applying to Government for its sanction to the transfer, and all such transfers are declared to be valid, provided they are conformable to the Mahomedan or the Hindoo laws (according as the religious persuasions of the parties to each transaction may render the validity of it determinable by the former or the latter Code), and provided they are not repugnant to any law, in force, which have been passed by the British administrations, or to any law that they may hereafter enact. (w)

Partial transfers of interests in land, however, must be notified to the Collector of the district where the property is situate for assessment of separate jumâ on the interest sold or conveyed. (x)

(u) I. L. R., 8. Cal. p. 144.

(v) Act I. of 1869—The Oudh Estates' Act 1869, sec. III.

(w) Beng. Reg. I. of 1793 sec. 9 ; & Bong. Reg. XXVII. of 1795 sec. 6.

(x) *Ibid*, sec. 10 ; and *Ibid*, sec. 7.

Transfers of land in the Bombay Presidency either by alienation or succession must be notified and registered in the Collector's books. (y) In the Madras Presidency a transfer of land, is invalid unless registered by the Collector. (z)

Madras Reg. XXV. of 1802, s. 8 authorizes Zemindars to transfer their proprietary right in their Zamin-
 Impartible Za-
 mindaries in
 Madras. daries, in whole or in part, without the previous consent of Government, and declares such transfers to be valid, provided they shall not be, repugnant to the Hindu laws ; but it renders necessary certain steps in the way of registration, and apportionment of the assessment ; in default of which "such sale, gift, or transfer shall be of no legal force or effect." (a) Mr. Justice Holloway thus defined the status of a Madras Zemindar :—"The Zemindar has an estate analogous to an estate-tail, as it originally stood upon the statute *De Donis*. He is the owner, but can neither encumber nor alienate beyond the period of his own life. If he had sold, the sale would be inoperative beyond his own life, and would amount merely to an alienation of his life interest." (b)

B, a Mirâsdar, addressed a *varinâmâ* to Mâmlatdar, resigning certain *mirâs* lands in favour of L (to whom at the same time he delivered possession of the lands), and containing no reservation or qualification : *Held* that the transfer to L was complete and the rights of B wholly extinguished. 'If, being a Mirâsdar with rights as such, B concealing this circumstance, induced L to take up the land and relieve him from the burden of assessment, he was bound to make good the apparent title which he conferred on L, and so was any one else who came in, like the plaintiff here, by a title created subsequently to the transfer to L.' (c)

(y) Bombay Act II. of 1876, ss. 30-36.

(z) Mad. Reg. XXV. of 1802 sec. 8 ; Mad. Reg. XXVI. of 1802 ss. 2 & 3.

(a) See *Subbarayulu v. Rama Reddi*, 1 Mad. H. C., 141 ; *Pitchakutti v. Ponnamma*, *Id.* 148 ; per Curiam 2 Mad. H. C., 139, 143.

(b) *Chintalapati v. Zemindar of Vizianagram*, 2 Mad. H. C., 128.

Pareyaswami v. Salugai Tevar, 8 Mad. H. C., 157.

(c) *Tara Chand Pirchand v. Lulhman Bhuwami*, 1 L. R., 1 Bom., p. 24.

The bank of a river is not regarded by the law as public property. It may be, and constantly is, private property, though there may be public rights of passage over it for the purposes of navigation. (*d*)

The rights of Bunkur (a right of cutting wood) and Phulkur (a right of gathering fruits) are ordinarily indicative of a certain dominion over the soil. (*e*)

In a sale of "*bunkur*" only, the profit arising from the trees of spontaneous growth, whether great or small, is sold, but *not* the land. The owner of the land may cut down any tree to clear the lands for cultivation. If he should afterwards be unable to cultivate the lands, he is responsible for the loss to the owner of the *bunkur*, to whom the timber of such trees felled trees belong. (*f*)

In a sale of "*Jalkar*" only, the profit arising from the water, whether by fishing or otherwise, belongs to the purchaser, and *not* the land it covers; but in the sale of a "*Jheel*" the land is included. (*g*)

A proprietor of the entire julkar rights of a pergunnah is entitled to fish in any natural water course or any jheel or pond *not* made by human agency. (*h*)

No farmer or leaseholder can, during the term of his lease, create for himself a sub-tenure which is to enure after the lease expires to the prejudice of the owner, whose *locum tenens* he is during the term of his lease. (*i*)

Credible evidence of the antiquity of a local custom is sufficient to determine whether tenures of a certain class are transferable by it. (*j*)

(*d*) *Roop Tall Doss v. The Chairman of the Municipal Committee of Dacca*, 22 W. R., 276. [C., 19.

(*e*) *Raja Lelunand Singh v. Maharaja Mohesaur Singh*, 3 W. R., P.

(*f*) *Byjoush Majumdar v. Deen Dayal Goout*. S. D. A. Rep. Vol. II. p. 105.

(*g*) *Lukhee Dass v. Khatima Bebee*, *Ibid.* p. 51; 24 W. R., 200

(*h*) *Kooroonamoyee Choudhrani v. Joysunker Chowdhery*, W. R., Sp. 267.

(*i*) *Jardine Skinner & Co. v. Rani Sarut Soondari Debi*, L. R. 5 L. A. p. 168.

(*j*) 11 W. R., 348

A *Kudeemee* or *Mauroosee* holding is something very much larger than what is known as a right of occupancy under the Rent Law ; and where according to the custom of the country, such a holding is a transferable tenure, the purchaser takes the whole of the rights of the previous holder against the Zemin-dar. (l) According to the custom of the Hoogly district, a tenure granted for building purposes is transferable. (l)

A custom to prove the transferable nature of *Khoodkast* Jotes need not be absolutely invariable. (m)

It is not necessary that a tenure should be a *Makarari* in order to be transferable. (n) Local custom may determine the transferable nature of a tenure with a right of occupancy. (o)

It is doubtful whether a transfer of a *Ryotwaree* tenure can be effected without the consent of the Zemindar or Talukdâr, as the case might be, the immediate successor in Estate. (p)

A yearly tenancy can not be transferred without the lessor's consent, and its character is not changed by enjoyment under the pottah for many years. (q) In Chota Nagpore, Jaghir lands are alienable, subject always to the rights which the owner of the soil has, as a reversioner, to resume on failures of heirs-male of the original grantee. (r)

Applying the maxim *optimus interpres rerum usus*, it may be shown by evidence as to the nature of the enjoyment of any immovable property, what the grant in its origin really was. Accordingly the frequent transfer of an interest in a tank without any change in the terms of the holding or in the amount of rent paid, extending over more than 60 years, was held to prove that the interest was a permanent and transferable one, which could be maintained against the proprietor of the taluk in which the tank was situate. (s)

(l) 23 W. R., 36.

(l) 11 W. R., 354; 12 W. R., 495; 15 W. R., 275.

(m) 6 W. R., 190.

(n) 1 W. R., 5; 6 W. R., (Act X) 95.

(o) 1 W. R., 153. 18 W. R., 55, 507. (p) 13 W. R., P. C., 18.

(q) 8 W. R., 337. See also 15 W. R., 175.

(r) *Raja Ramessur Nath Sing v. Hara Lal Sing*, 1 B. L. R., A. C., 170.

(s) 21 W. R., 386.

Cuttoogootaga lease in Madras is the term for a perpetual lease at a low fixed rent payable to the Zemindar, granted in consideration of military service performed by the ancestors of the grantee. *Held*, upholding such a tenure of a distinct part of a Zamindari in Madras, that a *Cuttoogootaga* lease was not an alienation of the Zamindari or any part thereof within the provisions of the Madras Reg XXV. of 1802, sec. 8, and did not require registration, as it could not, without great violence to language, be considered as a transfer within the words of the Regulation. In this case the title of the lessee had been recognized not only by the Zemindar who created the tenure, but by subsequent Zemindars, and there had been a possession under such lease of above fifty years. Lord Kingsdown in delivering the judgment of the Judicial Committee observed: "The language of the Regulation would seem to apply to questions between the Zemindar and the Government, and to have been framed with a view of preventing a severance of the Zamindari without public notice to the Government. It is not very obvious upon what principle it can be held that an instrument good against the party making it is bad against an heir, if the ancestor had an absolute power of alienation. If the successor is, as we should term it, a remainder-man, or claiming by a title which the ancestor could not defeat, the case, of course, is different. But their Lordships are of opinion that there is in this case no ground for the objection." (t)

When a purchaser takes possession of a non-transferable tenure, and interposes himself between the Zemindar and the ryots on the land, he, by that act, commits a wrong, and is a trespasser; and one mode open to the Zamindar to redress the wrong, must clearly be by a suit to declare that no interest is vested in such purchaser, or to restrain him from interfering with the collection of rent. (u)

(t) *Venataswara Yethapah Nascher v. Alagoo Moolloo Servugaren*, 8 M. L. A. 327 See Pandit's P. C. J. Vol. I. 788.

(u) Per NORMAN, J., in *Hurreeshur Mukerjee v. Jodoonath Ghose* 7 W R., 114.

Section 2.—Of Land in the Presidency-Towns.*

The nature and incidents of immovable property in the town of Calcutta have been the subject of several judicial decisions. As far back as the year 1785, it was decided by the Supreme Court of Calcutta that an executor or administrator, as such, might bring ejectment for lands in Calcutta of British subjects. The land of a British subject is, therefore, to be considered real property *sub modo*, not as in England, but qualified by the Charter. "The lands and houses of British subjects" said the Court "have usually been conveyed in this settlement, by deeds of lease and release, or by bargain and sale. The title by lease and release depends on the Statute of Uses^(v), which is a remedial act, and has always been considered by this Court as applicable to the lands of British subjects. The conveyance by deed of bargain and sale would indeed be endangered by the Statute of Enrolments (27 Henry VIII. c. 16), if the latter extended hitherto; but the court are of opinion that it cannot be so extended, because its provisions are inapplicable to this country. A mere bargain and sale of land is, therefore, sufficient here to convey an estate in fee, as it would have been in England under the Statute of Uses, if

* Section 17 of 21 George III. Chap. 70 enacts, that the Supreme Court of Judicature, at Fort William in Bengal, shall have full power and authority to hear and determine, in such manner as is provided for that purpose (in its charter or letters patent), all and all manner of actions and suits against, all and singular the Inhabitants of the city of Calcutta, provided that their *inheritance* and *succession* to lands, rents, and goods, and all matters of *contract* and *dealing* between party and party shall be determined, in the case of Mahomedans, by the laws and usages of the Mahomedans, and in the case of Gentoos, by the laws and usages of the Gentoos, and where only one of the parties shall be a Mahomedan or Gentoos, by the laws and usages of the defendant. There are similar statutory provisions for Bombay and Madras. See 37 Geo. III. Chap. 112, Sec. 13.

(v) 27 Hen. 8, c. 10.

the Statute of Enrolments had not been passed" (w). The common law of England and the greater part of the statute-law having been introduced into the Presidency-Towns of Calcutta, Bombay and Madras, the lands of British subjects prior to the 1st of January 1866, descended as in England except in so far as the descent was interrupted or the succession varied by Statute or Charter.

The proposition that all immovable property in Bombay was of the nature of chattel real, and that there was not any property of the nature of freehold of inheritance was disapproved of and denied by the local High Court as being irreconcilable with Royal charters, Acts of Parliament, and of the Legislative Council of India, decisions of the Courts, both in India and England, and the tenures of land and practice of conveyancers in Bombay. (x)

Sir Richard Garth in delivering his judgment in the case of *Sarkies v. Prosonomoyee Dossee* (y) thus dwelt upon the introduction of English law of Real Property in the Presidency-towns :

" The case has been argued at some length, and our attention has been called to a great many authorities, but I am bound to say, that from first to last I have never entertained the slightest doubt, either that the law of dower has been recognized in this country, amongst Europeans and Armenians, as a branch of the law of inheritance, or that estates which have been held by British subjects under the name of freehold estates of inheritance are in all essential respects the same estate which have been held in England under the same name.

" Indeed I should be extremely sorry to think that at this day any doubt could reasonably be thrown upon either of these propositions. For a long series of years, estates of inheritance have been enjoyed and dealt with by British subjects here in

(w) *Doe dem. Savage v. Bancharam Tagore*, Morlon's Reports p. 70. See also Clarke's Rules and Orders, (1829) p. 62.

(x) *Naoroji Beramji v. Rogers*, 4 Bom. Rep., O. C. J., 1.

(y) I. L. R., 6 Calc., 794.

the same way as they have been in England. They have been bought and sold as such—they have been transferred from hand to hand by modes of conveyance which are only applicable to English tenures, and meaningless as applied to any other tenures. They have been considered and treated as such by the Supreme Court since its first establishment, and they have been made the subject of real actions, which we all know constitutes a machinery quite inappropriate to any other than English tenures. And lastly, they have over and over again been recognized and dealt with as such by the Indian Legislature.

“So long ago as the year 1815, we have the direct authority of the Supreme Court in the case of *Emin v. Emin* (c) deciding—1st that the English law of dower was at that time recognized and enforced here as it was in England; and 2ndly that Armenian subjects of the British Crown residing in Calcutta were amenable to that law.

“From that time to the present, as far as we know, the correctness of this decision has never been questioned, and we have the further evidence that the law of dower was fully recognized, from the fact that a large number of fines have been produced before us from amongst the records of the Supreme Court, which have been levied from time to time *for the express purpose of barring dower*.

“Then we have the Dower Amendment Act of 1839 passed by the Legislature of this country corresponding in most of its provisions with the Dower Amendment Act in England, the 3 & 4 Wm. IV, c. 105.”

The leading case of *Freeman v. Fairlie* (a) decided in Chancery by the Lord Chancellor as far back as the year 1828 established the following propositions:—

(1.) That as far as British subjects are concerned, the English law was not only *then* the law of Calcutta, but that it was so from the earliest period of that settlement.

(2.) That the estate in land and tenements of a British subjects in Calcutta, was of such a nature as to descend to his heirs

(c) *Morton by Montrou, p. 242.*

(a) *M. I. A. 340.*

according to the English Law of Succession, that it was freehold of inheritance according to the acceptance of those terms by the Law of England.

(3.) That upon a conveyance by a former owner by deeds of lease and release to a new proprietor, the latter carrying his title-deeds to the Collector, obtains a new pottah as a matter of right ; the Collector can not refuse it, and the proprietor can insist upon it. In the same manner the heir-at law going before the Collector and satisfying him that he is the heir, is entitled to the pottah. There is a rent or tribute payable on these pottahs. The pottah is issued by the Collector and it appears upon the very face of it, that it is *nothing more than a fiscal regulation* introduced for the purpose of collecting the tribute to which the land is subject.

In the case of the *Mayor of Lyons v. The East India Company* (b) their Lordships of the Judicial Committee laid down the principles on which the exclusion from India of special English laws rests, and held, that the law, incapacitating aliens from holding real property to their own use, and transmitting it by descent or devise, has never been introduced into Calcutta, and that the Statute of Mortmain (9 Geo. II., c. 36) does not apply to India.

The descent of lands is according to the *lex loci rei sitæ* ; and in the old Supreme Court at Calcutta only three systems of law were administered—the British, the Mahomedan and the Hindu. (c) Under its charter, the Supreme Court sustained both at Law and in Equity, the titles of Heirs-at-law ; entertained and determined suits for foreclosure of mortgages-in-fee or for reconveyance-in-fee. It also passed fines to bar dower, and in several instances decreed an assignment of dower. The conveyances of lands and houses in Calcutta when the transaction was between Europeans, and where the entire interest was intended to be given to the purchaser, were usually by English

(b) 1 M. I. A. p. 175 ; Pandit's P. C. J. Vol. I. p. 107.

(c) *Musleah v. Musleah* 1 Balnois, 234 ; *Stephen v. Hume*, Fult, 420 ; *Aratoon v. Johannes*, Mert. 2nd Ed. 16.

freehold conveyances, chiefly by Lease and Release to the purchaser and his heirs for ever. The right of the heir-at-law was invariably admitted, except where it interfered with the claim of the executor. In many instances, lands in Calcutta were considered to escheat to the crown, for want of heirs; and grants were obtained in consequence through the Crown-officers in England of such lands in favour of illegitimate children of the deceased owner (d).

The descent and devise of immovable property in British India of all Europeans, Eurasians, Jews, Armenians and Christians are now regulated by the Indian Succession Act, 1865. Section 5 of the Act provides that the succession to the immovable property in British India of a person deceased is regulated by the law of British India, wherever he may have had his domicile at the time of his death.

The maxim, *Quicquid plantatur solo, solo cedit*, obtains in the Presidency-Towns as between British subjects. This inequitable principle of feudal law was established by the Statute of Gloucester 6 Edw. I c. 1, and it is questionable whether this Statute is at all applicable to India, and whether having regard to the common-law of the country as to removal of buildings and other fixtures by outgoing tenants (e), the maxim ought to be allowed to prevail against the Hindus and Mahomedans holding land under defective titles in the Presidency-Towns. The current of reported decisions in Calcutta has, however, been to uphold and perpetuate the injustice of the feudal rule (f); and a positive enactment of the Legislature or a decision of the Judicial Committee is needed to unify the law on the subject with that prevailing in the Mofussil.*

(d) Clarke's Rules and Orders, (1829) p. 63 &c.

(e) *Re* Petition of *Thakoor Chunder Paramanick* B. L. R. Sup. Vol. (F. B. R.) p. 595. See also 6 Bom. H. C. R. p. 80.

(f) *Brojonath Mullick v. Westin* 2 Ind. Jur N. S. 163; *Gour Gopal Dutt v. Bissonath Ghose*, Coryton's Rep., 41. *Bhoyrub Nuth Khettry v. Doyal Chand Laha*, Bourke's Rep. O. C, 159. See *Contra*, *Mudduck v. Kurmohar* 1. L. R. 5 Cal. p. 688.

* It has been lately held by the Privy Council that the English laws of Champerty and Maintenance do not obtain even in the Presidency-Towns.

A tenancy created by express contract between Hindus in Calcutta is within the words "matters of *contract and dealing* between party and party" in 21 Geo. III., c. 70 Sec. 17, and the rights of the parties and the incidents of the tenancy must be governed by Hindu law (g). In this case the ejected tenant was declared entitled to compensation for buildings erected by him during his tenancy. The rule of common-law laid down in *Thahoor Chunder Paramanick's* case (h),—viz., that buildings do not become the property of the owner of the soil on which they are erected, merely because they are erected, but that any one who has built on land which he occupies under a *bonâ fide* claim of title is entitled to remove the materials or to receive compensation for them,—has its origin in the Hindu and Muhammadan laws. It must always be borne in mind that the English law not being applicable either to the Hindus or the Muhammadans on the first settlement, the subsequent acquisition of the rights of sovereignty by the English might enable the Crown by express enactment to alter the laws of the country, but until so altered the laws remain unchanged. (i) The legitimate inference, therefore, is that as between Hindus and Muhammadans in Calcutta, the strict rule of English law as to buildings and other improvements going with the soil, ought not to be enforced.

In *Parbatty Bewah v. Woomatara Dubee* (j) the question was, whether the tenant of land in Calcutta, on which he had erected tiled huts was entitled to remove them. A custom to remove such erections was proved, and Mr. Justice Macpherson upheld the tenant's right to pull down and remove the tiled huts in case of ejectment by the landlord.

A fortiori they do not apply to India. "It would be most undesirable," said their Lordships, "that a difference should exist between the law of the Presidency-Towns and the Mofussil on this point." *Ram Coomar Koondoo v. Chunder Canto Mukerjee* I. L. R., 2 Cal. 256.

(g) Per WILSON J., *Mudduck v. Kurmokar* I. L. R., 5 Cal. 688.

(h) B. L. R. Sup Vol (F. B. R.) p. 595.

[I. A., p. 587.

(i) *The Advocate-General of Bengal v. Rance Surnomoye Dutt* 9 M.

(j) 14 B. L. R., 201.

CHAPTER II.

OF GENERAL PRINCIPLES AND MAXIMS AS TO
SALES AND PURCHASES.

It is a general principle of law that a man shall not avoid his own grant, and another that an heir is bound by the acts of his ancestor in respect of lands which he inherits from him. These principles are founded upon justice and common sense, for law is intended to suppress fraud, not to encourage it. (*k*)

A man cannot grant or charge that which he hath not. The owner of property cannot, in general, convey to another a title higher or more free from encumbrance than his own. (*l*)

If a person is the owner in possession, but has only a restricted power of alienating the property, he can in general give to no one a title except upon an alienation which is within the restriction. Thus a Hindu widow when she inherits her husband's property is owner of it; she fully represents her husband's estate, but she can not alienate it effectually except for certain specified purposes; and when she does alienate it for any other purpose, such alienation is void as against the reversionary heirs of her husband. (*m*)

So if a person is not the owner of property, or is only part owner, but has a power of alienating the property for special purposes not only to the extent of his own interest, but absolutely, so as to bind the owners, still he can only confer a title upon an alienation for the purposes specified. (*n*)

(*k*) See SIR BARNES PEACOCK, C. J., B. L. R. Sup. Vol. p. 851.

(*l*) *Varden Seth Sam v. Luckpathy Royjee Lallah*, 9 M. I. A. p. 303; Pandit's P. C. J. Vol. I. p. 827.

(*m*) MARKBY'S Lectures on Indian Law, p. 88. 2 W. R. 123.

(*n*) *Ibid*, p. 89. 3 W. R. p. 75.

Thus the power of the manager for an infant heir to charge an estate not his own is, under the Hindu Law, a limited and qualified power. It can only be exercised rightly in a case of need or for the benefit of the estate (o). Thus too the manager of a Hindu Joint family can alienate the property not only of himself, but also of his co-sharers, for certain purposes ; but if he alienate it for any other than these purposes, the alienation is void. (p)

All *bonâ fide* alienations are binding on those who made them, and their heirs, successors or representatives in interest. A grantor shall not derogate from his absolute grant. In every case, therefore, of sale of one of two adjoining tenements, by the owner of both, the prudent vendor will by express reservation or regrant, keep on foot for his own benefit, in respect of the tenement retained, any easement or *quasi*-easement which he may have acquired or enjoyed, or which he may desire to exercise over the tenement sold. So on the grant by the owner of a tenement of a part thereof as it is then used and enjoyed, there will pass to the grantee only those *continuous* and *apparent* easements and *quasi* easements which are *necessary* to the reasonable enjoyment of the property granted. If the grantor however, intends to reserve any right over the tenement granted, it is his duty to reserve it expressly in the grant. But there is the well-known exception which attaches to cases of what are called *ways of necessity*. (q) In fine, if a man wishes to derogate from his grant or to reserve any right to himself, he should state so in the grant itself.

Covenants or other burdens which are annexed to land run with the land. *Transit terra cum onere*.

A grant is always to be taken strongly against the grantor and his representatives in interest. (r)

A grant to be taken against the grantor.

(o) 6 M. I. A. p. 393.

(p) MARKBY'S Lectures on Indian Law, p 89.

(q) *Sury v. Pigot*, Tudor's Lead. Cas. Conv. 127.

(r) *Pisuruddin v. Madhusudan Pal Chowdhry*, B. L. R. Sup. Vol. p. 75.

No implication
of reservation
except of ease-
ments of neces-
sity.

There can be no implication of reservation of any right in favour of the grantor, except by express contract. Easements of necessity, however, come under implied reservation.

A grant of property carries with it all the legal incidents of which are necessary for the reasonable enjoyment thereof. It is, therefore, a general rule that the grant or conveyance of a principal thing shall be held to carry with it all that is reasonably necessary for the enjoyment of the thing granted. *Res accessoria sequitur rem principalem.* The accessory right follows the principal, and *accessories* are either corporeal or incorporeal, and consist of appurtenances, rights, easements, privileges and other appendages. It must be borne in mind that the incident passes by the grant of the principal, and *not* the principal by the grant of the incident.

In a sale of lands, or of a house, the lands or the house is generally sold with its *rights* and *appurtenances*. *Rights* are such things as are essentially necessary to the use of the subject of the sale, as a road for passing to and from the ground. *Appurtenances* are things from which an advantage is derived but in a subordinate degree, as a well, a drain, a stable and a cook-room. As these do not constitute any part of the house, or the ground, but are merely dependant on it, and as the house or the land may be sold without them, they do not follow the sale of the lands or the house, unless generally or specially stipulated for. (s)

In a sale of land, or of a house, all fixtures are included, though they may not have been specified by the seller. Fixtures comprise all such things, as can not be removed without actually detereorating the thing. In a sale of "land," the trees on it are included, because they are connected with the land in the nature of fixtures, and there was no intention of cutting them down; but neither the corn growing on the lands, nor the fruit upon the trees follow the land, as they are intended to be cut down and gathered. The seller must however remove them before delivery.

(s) Elberling, Chapter on Sales p. 195.

In the sale of "a house" the foundation and superstructure, the windows and doors are necessarily included, but not loose shades or huts, which may be removed without injuring the house.

The Rule as to proof of payment of consideration in India.

In cases of contract in India, it is indisputable that it has never been held that a contract made under seal of itself imported that there was a sufficient consideration for the agreement.

The established practice of Courts in India, is to take nothing for granted and to require satisfactory proof that consideration had been actually received according to the terms of the contract; but the mere denial of the receipt of the consideration stated is *not* in all cases sufficient to cast upon the party relying on the instrument the burthen of proving payment of that consideration. Where a party comes into Court to set aside a deed of sale or mortgage on the ground of want of consideration, he must establish a *prima facie* case entitling him to relief. (t)

The principle of English law is that a document sealed and delivered imports consideration. This doctrine does not obtain in India and it is always open to the defendant to show that the Plaintiff was suing on a contract for which there was no consideration other than natural love and affection which cannot be made a ground of a suit for damages for breach of covenants for title. (u)

Meritorious consideration, such as love, affection &c., though good as between the parties themselves, is not in the eye of the Law *bona fide*, if it is inconsistent with that good faith which is due to creditors. (v)

Marriage is a valuable and not merely a good consideration. (w)

Where there is a real transaction between the parties for valuable consideration, whether it be by way of sale and mort-

(t) *Kaleepershad Tewarree v. Rajah Sahib Pershad Sein.* 12 W. R. P. C. 11; S. C., 12 M. L. A. 282; Pandit's P. C. J. Vol II. p. 430.

(u) *Raju Balu v. Krishna Rai Rav Chandra I. L. R.* 2 Bom. 274.

(v) *Strong v. Strong* 18 Beav 408. [Mad. Rep. 128.

(w) *Chinlalapati Chinna Shimbadriraj v. Zemindar of Vistanagram* 2

to sell it with such rights as the owner thought should be attached to particular parts of it."

G, the owner of certain property, sold it in lots to different persons. The plaintiffs purchased a portion of the property, and obtained from G a conveyance, in which the southern boundary of the land purchased by them was stated to be "the land of the said G, out of which he has allowed a passage six feet broad running almost straight west and east, and terminating on another passage leading, &c.;" the deed continued, "which two passages the said G hath granted and allowed, and doth hereby grant and allow to" the plaintiffs "their heirs, representatives, and assigns, and all other the purchasers of the northern portion of the said piece of land, &c., together also with the right of the two passages for ingress and egress hereinbefore mentioned." In the second deed, conveying another parcel of land to the plaintiffs, G, said, with reference to the latter passage, "no one shall be able to throw sweepings or filth on the said road, or make it unclean; if any one does at any time act thus, you will deal with him according to the laws in force." The defendant had become possessed of part of the northern portion of the land sold by G, and he also owned, under a distinct title, a house abutting on the lane in dispute, but having no doors opening into it. Shortly before the institution of the present suit, the defendant constructed three doors opening on to the lane, two of which were used for the purpose of cleaning two privies on the defendant's premises, and the third was used by the defendant and his servants as a means of access to the lane. In a suit by the plaintiffs seeking damages for trespass, and an injunction against the alleged wrongful user of the lane by the defendant, and praying that he might be ordered to close the three doors,—*held* (*per* Couch, C. J., and Markby, J., overruling the decision of Macpherson, J.), that the plaintiffs had not such a property in the soil of the lane as would entitle them to prevent the defendant, from making new doors on to the lane, and to restrain him from using the doors already made; they

Right of Way.
Ownership of
Soil. Injunction.

had only a right of way : but an injunction was granted restraining the defendant from using his door-ways for the purpose of cleaning his privies or in any other manner so as to obstruct the free use by the plaintiffs of the lane. (e)

Easement. Right of way—Unity of possession. Severance. Nuisance arising from acts of several persons.

The words “appurtenant or belonging” will ordinarily carry only actual existing easements, and therefore will carry no right of way over the land of the grantor, though, under certain circumstances, even these words will have a wider construction. Where further words are used, such as ‘therewith held or used,’ such words will carry a way formerly enjoyed as an easement, but as to which the right has been suspended by unity of possession. But such words will not carry a way made by the owner of both properties during the unity of possession for his own greater convenience in the use of the two properties jointly. But where, during the unity of possession, a way, which has never existed as an easement, is in fact used for the convenience of one of the tenements afterwards severed, the authorities show that the words in question are large enough to carry it. One who has a right of passage over any place, must not, any more than the owner of the soil might, use it in an excessive or improper manner so as to obstruct the exercise by others of their rights. *Sic utere tuo ut alienum non lœdas.**

The acts of several persons may together constitute a nuisance, though the damage occasioned by the acts of any one, if taken alone, would not be appreciable. (f)

The word ‘easement,’ as used in the Limitation Act 1877, has, by force of the interpretation-clause (s. 3.), a very much more extensive meaning than the word bears in the English law, for it includes any right not arising from contract by which one person is entitled to remove and appropriate for his own profit any part of the soil belonging to another, or anything

Easement. Fishery. Prescription. Profit à Prendre. Limitation Act (XV of 1877), ss. 3 and 26. User.

(e) *Madanmohan Sen v. Chandra Kumar Mookerjee*, 9 B. L. R., 328.

(f) *Chunder Coomar Mookerji v. Koylash C. Sett*, I. L. R., 7 Cal. 665.

* So use your property as not to injure the rights of another. Every man is restricted against using his property to the prejudice of others.

growing in, or attached to, or subsisting upon the land of another. An easement, therefore, under the Indian law, embraces what in English law is called a *profit à prendre*,—that is to say, a right to enjoy a profit out of the land of another. A prescriptive right of fishery is an 'easement' as defined by S. 3 of the Act, and may be claimed by any one who can prove a 'user' of it,—that is to say, that he has of right claimed and enjoyed it without interruption for a period of twenty years, although he does not allege, and can not prove, that he is, or was, in the possession, enjoyment, or occupation of any dominant tenement. (g)

In 1860 R. whom the plaintiff in this suit represented agreed with Government for the lease of a plot of ground called the D. estate and got possession. In 1865 R took a lease of the estate from Government for 999 years, to enure as a lease from 1860, the time at which he entered upon possession. The defendant's estate adjoined the plaintiff's. Defendant's title, also derived from Government, dated from 1869. A formal lease was granted to his predecessor in 1874 in similar terms to that to plaintiff.

In 1864 R opened an artificial channel for the conveyance of water for the use of his estate. This channel was taken off from a ravine in Government waste land, and before reaching the plaintiff's estate passed through land which in 1864 belonged to Government, but which subsequently formed portion of the defendant's estate.

When the lease, under which the defendant claimed, was made in 1874, the flow of water through the channel was enjoyed by the plaintiff. The plaintiff sued to restrain the defendant from interfering with and diverting the flow of water in this channel and for damages.

It was held that the flow of water in the channel having existed as an apparent and continuous easement in fact at the time of the execution of the lease in 1865, a right to it passed by implication under that lease, and that the plaintiff was

(g) *Chundern Churn Roy v. Shib Chunder Mondul*, I. L. R., 5 Cal., 245.

accordingly entitled to it; that the defendant, whose lease was subject to that right, was not entitled to interrupt the flow; but that he might use the water in a reasonable manner as it flowed through his land. (h)

Malikâna is an annual recurring charge on immoveable property, and may be sued for and recovered by the purchaser of such rights within twelve years from the time when the money sued for becomes due. (i)

Malikâna,
suit for Limita-
tion Act (XV of
1877), sched. ii.
art. 132.

The rule of *Caveat Emptor*. The rule of *Caveat Emptor** deprives the buyer of any remedy against his own *laches* (j), for he ought not to be ignorant of the interest he is about to buy. In the case of a purchaser who was a neighbour of the vendor, and who consequently had ample opportunity of enquiring into the title of the property himself, but who appeared to have made no enquiry and to have bought it without taking any trouble in the matter, Sir Richard Garth thus dwelt upon the duty of every provident purchaser:—"By the rule of *Caveat Emptor* (which applies as much in India as in England) the buyer is bound by Law to take care of himself; he is bound to see that what he buys, he buys after satisfying himself that there is a good title. It is a very old maxim of law, and a very good one, that if people will not assist themselves, the Law will not assist them; if a person chooses to buy a property without looking into the title, he does so at his own risk, and the Law will not help him to get rid of his bargain. The authorities are overwhelming to show that, if a deed of purchase has been once executed, unless there is an eviction by the vendor or some person claiming under him, there is no right of action against the vendor, and the purchaser is without remedy. The purchaser is bound

(h) *Morgan v. Kirby*, I. L. R., 2 Mad., 46—7.

(i) *Hurmuzi Begum v. Hirday Narain*, I. L. R. 5 Cal. 921. [p. 45.]

(j) *Gour Kishore Saha v. Chunder Kishore Dutt Mozoomdar* 25 W. R., * The Transfer of Property Act, 1882 does not dispense with the exercise of "ordinary care" by purchasers of immoveable property. Act IV of 1882, sec. 55, cl. 1, (a).

to look not only to his own title, but to see that he is properly indemnified by the covenant in his deed ; and if he does not choose to protect himself by ascertaining that he is buying with a good title, and by taking care that he is properly protected by proper covenants, he has no remedy." (k)

Where a party purchases an estate sold in execution after notice that parties other than the judgment debtor claim rights and interests in the property, the rule of Caveat Emptor applies. (l)

Where the purchaser is aware that the vendor's laudatory statements are in fact untrue, and yet enters into the contract the maxim Caveat Emptor applies.

A bonus paid for a putnee not in existence is refundable there being an entire failure of consideration the principle of Caveat Emptor not applying to such a case. (m)

Where a vendor, knowing that he has no right or title to property or being cognisant of the existence of incumbrances or of latent defects materially lowering its value, sells it and neglects to declare such defects to the purchaser there is a fraudulent concealment vitiating the contract and rendering inapplicable the principle of Caveat Emptor. (n)

Where the plaintiff purchased from a defendant an estate which had, before the sale been attached under a decree held by another party against defendant and paid the amount of the decree and interest to prevent a sale in execution it was held that the principle of Caveat Emptor was wholly inapplicable to such a case, and that whether the plaintiff did or did not know of the attachment, she was entitled to recover from the defendant the amount which she had paid. (o)

An intending purchaser of property, which has been previously mortgaged, who has no reason to suppose it to be joint

(k) *Gourkishore Saha v. Chunder Kishore Dutt* 25 W. R., 45, 47.

(l) *Sahabooddeen Choudhery v. Ramgutty Chuckerbutty*, 9 W. R., 556.

(m) *Kristo Lal Moitra v. Nabo Kumar Roy*, 5 W. R., 222

(n) 7 W. R., 258.

(o) 10 W. R., 380 ; 2 B. L. R., A. C., 87.

family property, or the vendor to be a member of a joint family, and who has enquired of and learnt from the mortgagee that there was no fraud, is not bound to make any further enquiry. (p)

If a person knows that another has, or claims an interest in property for which he is dealing, he is bound to enquire what that interest is ; and if he omits to do so, he will be bound, although the notice was inaccurate as to the particulars or extent of such interest. (q)

A vendor legally conveying all his title cannot be sued for money had and received, although the title prove defective.

Accordingly, where the plaintiff bought two kanam claims, and sued upon them unsuccessfully, it was held that he could not recover the purchase money from his vendor's representatives, on the ground that the consideration for the payment had failed. A purchaser can not recover the purchase-money in equity when the conveyance has been executed by all necessary parties, and he is evicted by a title to which the covenants do not extend. (r)

A *bonâ fide* purchaser is entitled to refund of purchase-money in a case where some dispute having arisen as to the purchase, the matter was referred to arbitration, and it was held that the vendor had no authority to sell. The principle of Caveat Emptor does not apply to such a case. (s)

Caveat Venditor. Let the vendor beware. Persons who allow a property to leave their possession before the purchase-money is complete cannot recover from third parties who are *bonâ fide* purchasers for valuable consideration, even if these persons shall be held to have had notice of the amount of the consideration-money remaining unpaid. (t)

In judicial-sales in execution of decrees of Court there is ordinarily no warranty of the title of the judgment-debtor

(p) 20 W. R., p. 100.

(q) 22 W. R., 248 ; See also 14 B. L. R., 337.

(r) *Muhamud Mohuddin v. Uttayil Umacha*. 1 Mad. Rep., A. C., 390.

(s) *Kishen Mohun Saha v. Ram Chunder Dey*. 3 W. R., 28.

(t) *Jogoo Koonwar v. Parbatty Koonwar*. 3 W. R., 139.

in the property sold, on the part of the decree-holder or the officer conducting the sale.

In a sale in execution of a decree of the rights and interests of a judgment-debtor in an estate of which he is the recorded proprietor in the revenue registers, it is usual to describe such rights and interests in the sale-proceedings as recorded in such registers, but such description does not amount on the part of the decree-holder or the officer conducting the sale to a warranty that such rights and interests are correctly described.

Where, therefore, according to the usual practice, the rights and interests of a judgment-debtor in a share of a village of which he was the recorded proprietor in the revenue-registers, were proclaimed for sale in the execution of a decree and sold, described as recorded, and the sons of the judgment-debtor subsequently sued the auction-purchaser to recover their interests in such share and obtained a decree for such interests, and the auction-purchaser thereupon sued the decree-holder for a refund of the purchase-money, proportionate to such interests and for the costs of defending such suit, it was held, there being no fraud or misrepresentation on the part of the decree-holder, or any thing of an exceptional nature showing an express or implied warranty on his part, that the suit was not maintainable. (u)

Qui prior est tempore, potior est Jure. He who is first in point of time, is more powerful in Law. This maxim of Equity is recognized by Hindu Law. Narada says: "In the case of a gift, a pledge, or a purchase the prior act has the greater force." (v)

As between two rival claimants in other respects equal, he who is first in point of time is strongest in point of right. Thus if a Zamindar sells a patni right to one after having mortgaged the same land to another, the mortgagee's title as

(u) *Ram Narain Singh v. Mahtab Bibi*, I. L. R., 2 All. 828.

(v) Narada's Institutes ch. iv, v. 27.

being first in point of time must, as a general rule, prevail over that of the patnidar, however innocently the patnidar may have taken and paid for his right. (w)

The proprietor of certain immovable property conveyed it first to one person and then to another. The Priority as between the First and the Second purchaser. first purchaser sued the vendor and the second purchaser for the possession of the property, alleging that he had been first in possession of it but had been ousted by the second purchaser. It was *held* that the first sale was not void by reason of the non-payment of the purchase-money, and that the second sale being invalid as having been made by a person who had no rights and interests remaining in the property, the second purchaser was *not* a representative of the vendor and entitled to receive the purchase-money found to be still due to him from the first purchaser, and to retain possession of the property until the receipt of that purchase-money. (x)

Plaintiff purchased from the first defendant, who purchased from the person admitted to be the owner in 1856. The resisting defendants claimed under a subsequent sale by the same person. It was held, reversing the decree of the lower court, that, on the simple principle that after the conveyance to the first defendant the owner of the land had nothing whatever to convey, the resisting defendants took nothing, and the plaintiff was entitled to recover. (y)

Plaintiff in 1862 purchased a house of first defendant, which was already hypothecated to second defendant. In 1863 second defendant sued first defendant in the Small Cause Court for the debt on account of which the hypothecation had been made, and got a judgment. He then had the house attached and put up to auction, bought the right, title, and interest of the judgment-debtor in the premises, and entered and continued in possession. Plaintiff claimed in the present suit to recover possession in right of his purchase in 1862. It was held, that,

(w) MARKBY'S Lectures on Indian Law, p. 88.

(x) *Ram Lakhan Rai v. Bandan Rai*, I. L. R. 2 All, 711.

(y) *Virabhadra Pillai v. Hari Rama Pillai*, 3 Mad. Rep., A. J., 88.

as first defendant had no interest whatsoever in the property at the date of the purchase, second defendant's purchase was not a purchase from the debtor in part satisfaction of his debt. Second defendant's claim still existed, and he could pursue his remedy, either against the person or the property; and that as he was in possession, he had a right to demand the liquidation of the debt due to him before submitting to be turned out. It was held also that the obligation of the first defendant gave the second defendant a two-fold remedy: one against the person, and the other against the thing. (z)

Equity aids the vigilant and not the indolent. *Vigilantibus, et non dormientibus jura sub-veniunt*. The laws help the watchful and not the slothful. Encouragement is not given by Courts of Justice to stale demands. Where a party to a contract seeks release from its obligations, on the ground that, for some reason or another he is entitled to repudiate it, he must assert this right as soon after becoming aware of it as he reasonably can. Long inaction unaccounted for must be held in equity to be a ratification of the contract. (a)

He who would disaffirm a contract entered into by mistake, must do so within a reasonable time, and will not be allowed to do so unless both parties can be replaced in their original position. (b)

Mere lapse of time, except where it is a statutory or positive bar to relief, is only evidence of acquiescence, but a *cestui-que trust* wishing to impeach a sale must do so within a reasonable time; which as a matter of fact, is generally less than the time allowed by the Statute of Limitations: though independently of Statutory limitation, no positive limit can be imposed, and each case must be governed by its own circumstances. The general tendency of modern decisions is to discourage stale demands; and where there are other circumstances showing acquiescence, beyond the lapse of time, a short delay will be suffi-

(a) *Mom Reddi v. Venkata Reddi*, 3 Mad. Rep., A. J., 241.

(a) *Isham Okunder Mojoondar v. Sreekanth Nath*, 2 W. R., 110.

(b) *Mahomed Mahiuddin v. Uttayil Umache*, 1 Mad. Rep., A. C., 390.

cient bar to relief. A longer time, however, is allowed to a class of persons, *e. g.* creditors, than would be allowed to an individual. A married woman may bind herself by acquiescence as regards her separate property. (c)

Applying the maxim of *optimus interpret rerum usus*, it may be shown by evidence as to the nature of the enjoyment of any immovable property what the grant in its origin really was. Accordingly, the frequent transfer of an interest in a tank without any change in the terms of the holding or in the amount of rent paid, extending over more than 60 years, was held to prove that the interest was a permanent and transferable one, which could be maintained against the proprietor of the talook in which the tank was situate. (d)

Alienatio rei præfertur jure accrescendi.—Alienation is favoured by the Law rather than accumulation.

“Aliud est tacere,—aliud celare”—It is one thing to be silent and another to conceal (*suppressio veri*).

Cujus est dare ejus est disponere.—The bestower of gift has a right to regulate its disposal, *e. g.*, reservations in a grant or demise of land.

Assignatus utitur jure auctoris.—An assignee is clothed with the rights of his principal.

Cuiusque aliquis quid concedit, concedere videtur et id, sine quo res ipsa esse non potuit.—Whoever grants a thing to any person, is supposed tacitly to grant that also without which the grant itself would be of no effect.

Accessorium non ducit, sed sequitur suum principale.—The incident shall pass by the grant of the principal, but not the principal by the grant of the incident. The purchaser of a house acquires the right to the use of a way to a road which had been enjoyed with the house by the vendor, if it is not merely a right to a way of necessity, but a particular right over a defined path. (e)

(c) Dart on V. & F. 5th Ed p 41.

(d) *Nulhee Kristo Bose v. Nistarnee Dossee*, 21 W. R. 386.

(e) *Nobin Chunder Bullub v. Dhobun Chunder Mundul*, 15 W. R. 526.

Simplex Commendatio non obligat.—A simple recommendation or puffing does not imply a warranty.

Traditio loqui facit chartam.—Delivery makes the deed speak. A deed operates from the date of its delivery.

Transit terra cum onere.—The Land passes with all its encumbrances. These are either corporeal or incorporeal.

Uberrima fides.—The most abundant faith is required of all persons in a fiduciary position.

Consuetudo loci est observanda.—Local custom is to be observed. A custom to be valid must not to be *Contra bonos mores*—against good morals nor against public policy.

The general rule in the Presidency of Bombay is that, amongst Hindus, possession is necessary in order to perfect a transfer of immovable property by mortgage or deed of sale as against subsequent encumbrancers or purchasers. The main ground of this rule is that possession is notice to all subsequent intending purchasers or mortgagees, of the title of the party in possession.

It is, however, the established and judicially recognized custom of Gujrat, that possession is not necessary in the case of *san-mortgage** to validate it as against subsequent purchasers or mortgagees. The necessity of possession being thus dispensed with, it seems to follow that a *san-mortgage*, in other respects good, is valid as against a subsequent purchaser or mortgagee, whether or not such purchaser or mortgagee has notice of the *san-mortgage*. To hold that a subsequent purchaser or mortgagee for valuable consideration and without notice of a *san-mortgage* is entitled to priority over it, would be tantamount to depriving the *san-mortgagee* of the benefit of the custom that possession is unnecessary.

A buyer of property at an execution-sale who registers his certificate of sale does not thereby acquire a title free from the obligation arising from a *san-mortgage* of previous date. When the Court sells the right, title and interest of the judgment-debtor in the property, it can not be regarded as selling more than

* In Gujrat a *san-mortgage* or *sankhat* means a mortgage without possession.

the judgment-debtor himself could honestly sell. He could honestly sell only subject to any equities against himself on the property ; and if by concealment of a *san*-mortgage he sold property as free of that charge, he would commit fraud. The Court can not be deemed to do that which would be a fraud if done by the judgment-debtor. If, then, the Court sell only the right, title and interest of the judgment-debtor subject to all existing equities against the property sold, the registration of the Court's conveyance, *vic.*, the certificate of sale, can not enlarge the scope of that conveyance and discharge the property from any unregistered encumbrance which was binding on the judgment-debtor. (f)

The Zamindars of a certain mohulla claimed from the purchaser of a house situated in such mohulla which had been sold in execution of a decree, *one-fourth* of the sale proceeds of such house, such purchaser being the holder of such decree. The suit was based upon the terms of the *wajib-ul-arz*. That document stated, *inter alia*, that when a house in such mohulla was sold, a cess called *chaharam* was received by such Zamindars "according to the understanding arrived at between the seller and the Zamindars." Held, that such Zamindars were not entitled under the terms of the *wajib-ul-arz* to one-fourth of the sale proceeds ; that the decree-holder, because he happened to have become the auction purchaser, could not be regarded as the seller, and it was only the "seller" who was liable ; that the terms of the *wajib-ul-arz* were applicable only to private and voluntary sales and not to execution-sales held compulsorily under process of law ; and that under these circumstances the suit as brought must be dismissed with costs. (g)

Where by custom the Zamindar is entitled to a quarter share of the sale-proceeds as his *Huq-Zamindari* he is entitled to recover it on the occasion of sales either absolute or originally conditional but subsequently becoming absolute by fore-

(f) *Sobhag Chand Golab Chand v. Bhai Chand*, I. L. R. 6 Bom. 194.

(g) *Beni Madho v. Zahur-ul-Haq*, I. L. R. 3 All., 797.

closure, from the vendor and the purchaser ; and the latter cannot be discharged from his liability by proving that he has paid all including Zamindar's dues to the former, it being incumbent on him to see that the Zamindar is satisfied in respect of his dues. It was further *held* that under the circumstances, the plaintiffs, the zamindars were entitled to $\frac{1}{4}$ from Rs. 450, the principal amount repayable and not from the amount ascertained at the time of foreclosure to be due to the mortgagee including interest, inasmuch as the deed made no provision for payment of any sum as interest. (h)

Lex non cogit ad impossibilia. The law forces not to impossibilities.—Where the owner agrees and contracts with his tenant under a lease for years that neither he nor his assigns, would during the term, permit any building to be erected on land fronting the demised property and the land is subsequently taken by Government under the Land Acquisition Act for public purposes and a building is erected thereon the owner must be held to be discharged by the Act from his obligations under the covenant. When land is taken by the Government under the Land Acquisition Act, the land is absolutely vested in the Government free from any right of way previously enjoyed by the public over such land. (i)

A right of way can not by the provisions of Act VI of 1857, continue to exist over land acquired by a Railway company under that Act with the aid of Government. If, however, the Railway company by their representations and conduct, lay themselves under legal obligation to provide a road or crossing such obligation may be enforced. (j)

Prudens q̄æstio est dimidium scientiæ—Skillful inquiry is half knowledge.

There should be *juris et seisinæ conjunctio*—combination of both right and seisin in a vendor.

(h) *Heera Ram v. Hon'ble Sir Raja Deo Narain Singh*, N. W. P. H. C. F. B. R. 48.

(i) In the matter of the Petition of *H. B. Fenwick*, 6 B. L. R. Ap. 47.

(j) *Collector of 24-Pargunas v. Nobin Chunder Ghose*, 3 W. R. 27.

Presumption of
Regularity—
Irregularities.

The maxim *omnia præsuntur rite esse acta* cannot apply where it is plain that the greatest possible irregularities have occurred. (k)

Forma legis forma essentialis. The forms and requisitions of law must be complied with. "Formality" says the Hindu lawyer Jagganâtha, "is ordained for the sake of proof."

The rules laid down by the Law are based partly on expediency and partly on public policy, and their object is to secure honesty in dealings between man and man and to facilitate the proof thereof when these come to be adjudicated upon in a Court of Justice. The requirements of the Stamp and Registration Acts must always be fulfilled to ensure the validity of transfers.

If a putnee is sold for arrears of rent without the notice required by Regulation VIII. of 1819, the sale is informal and can be set aside, notwithstanding the *bonâ fides* of the purchaser. Where such sale was so set aside and the Lower Appellate Court refused to make an order for refund of the purchase-money, the High Court in special appeal, and with reference to s. 14 cl. I of the Regulation VIII. declared the purchaser entitled to a refund with interest. (l)

In a suit for possession of land on the ground of title under a Kobalah, it is not enough for the plaintiff to prove the writing and signature of the Kobalah; he must also prove that it was *delivered* as a complete instrument, and was made over to the grantee as such, and not merely as a signed document to be completed afterwards by being delivered to the Plaintiffs. In this case the defence was that the Kobalah had not become a complete conveyance of the land. (m)

The notion that a sale or transfer cannot be made or proved without a deed of sale or some written agreement is a misconception and erroneous. (n) The partition of a premises into

(k) *Chowdhry Mahomed Zuhoorul Hug v. Mahomed Yakooob*, 23 W. R. 367.

(l) *Mobaruck Ali v. Ameer Ali*, 21 W. R. 252.

(m) *Shawkh Omed Ali v. Nidhee Ram*, 22 W. R. 367.

(n) *Mussumat Bookho v. Madho Das Byrages*, 1 N. W. P. H. C. Rep 59.

separate portions and the subsequent several and independent occupation thereof by the parties as well as the acquiescence *inter partes* in the reconstruction or rebuilding over such portions at their respective expense—are facts which may be alleged and proved to show the *factum* of a transfer of property in the absence of any written document.

The Transfer of Property Act, however, makes it now compulsory that all sales of tangible immovable property of the value of one hundred rupees and upwards as well as all sales of a reversion or other intangible thing should be by a duly registered instrument. (o) In the case of tangible immovable property of a value less than one hundred rupees, such transfer may be made either by a registered instrument or by delivery of the property. (p)

“According to Hindu Law” said Mr. Justice West “a symbolical delivery will in the appropriate cases suffice. Where, therefore, there has been a public avowal of a sale, gift, or mortgage by registration, the transfer appears to be completed. The change of ownership proclaimed to all, perfects a right available against all; in other words, a real right instead of one ‘*in personam*.’ The effect of notice of a prior contract to the individual purchaser or incumbrancer seems to rest on a somewhat different principle. In such a case there has not, unless the requisites have been fulfilled, been a complete transfer of the real right; but the second contractor, taking with notice of the prior dealing, is not allowed, as we have seen, by the Hindu, any more than by the English law, profit by his share in the vendor’s fraud.” (q)

The weight of authority in Bombay preponderates greatly in favour of the necessity of a transfer of possession, as the necessary complement of a contract, in order to effect an absolute change of ownership by sale. The transfer of possession may be replaced by registration or by a decree giving notice

(o) Act IV. of 1882 sec. 54 cl. 2.

(p) *Ibid.*, sec. 54 cl. 3.

(q) *Lalu Bhai Surchand v. Bai Amrit*, I. L. R. 2 Bom 333—34.

to all of the change; but, in the absence of some such public indication, the only right acquired by a vendee, as by a mortgagee or donee, is one of an equitable character enforceable only against the vendor and those taking under him with notice and *not* against purchasers or sub-purchasers in possession without notice, whose legal title, fully acquired, cannot be cancelled by the Courts, on the ground of dishonest or unconscionable means having been used in acquiring it.

No words of inheritance are requisite to continue to his heirs a Hindu's interest in a freehold state. (r) A Hindu could by the Hindu law pass land by delivery without any writing; but the Transfer of Property Act coming into operation on the 1st July 1882 makes writing and registration indispensable in all sales of reversions and other intangible rights and in all cases where the value of the land or interest sold is Rupees one hundred and upwards. This Act exempts from its operation the Presidency of Bombay, the Punjab and British Burma.

No transfer of any estate, or of any portion thereof, or of any interest therein, made by a Taluqdar or other Grantee, or by his heir or legatee, under the provisions of the Oudh Estates Act, shall be valid unless made by an instrument in writing signed by the transferor and attested by *two* or more witnesses. (s)

He who seeks Equity must do Equity.

The plaintiff as purchaser at a Court's sale sued to recover land in possession of the defendant. The defendant alleged that he had bought the land from the widow of the previous owner by whom it had been mortgaged, and that he (the defendant) had paid off the mortgage. The previous owner had left a minor son. The lower Courts passed a decree for the plaintiff, on the ground that the sale by the widow to the defendant

(r) *Sreemutty Anundomoyee Dossee v John Dos dem East Indian Company*, S. P. C. J., 383, See also 8 M. I. A., 43; Pandit's P. C. J. Vol. I., 708.

(s) The Oudh Estates Act (I. of 1869), sec. XVI.

was invalid, as she had not obtained a certificate of administration to her husband under Act XX. of 1861. It was held that the defendant had a lien upon the land for the amount of the mortgage-debt which he had paid, and that the plaintiff could not set aside the sale to the defendant without refunding the amount secured by the lien. (t)

The plaintiff on coming of age sued to set aside a sale of his ancestral property which had been made by his guardian during minority. No legal necessity was proved, but it appeared that he had the benefit of the sale-proceeds. A decree was passed in his favour, but subject to the condition that he should first refund the proceeds of sale. (u)

B advanced money to A for the purchase of an estate. The estate was purchased by A, but it was conveyed to B. It was held that before A could maintain a suit to obtain possession of the land from B, he was bound to pay or tender the money advanced by B. "The plaintiff, who seeks Equity, must do Equity. He must pay the purchase-money to the defendant, before he is in a position to ask the Court to deprive the defendant of the possession he now enjoys, and to compel him to deliver up the property to the plaintiff." (v)

Where a purchaser for value is evicted in Equity under a prior and paramount title, he will be credited with all moneys expended by him in necessary repairs or permanent improvements, except improvements made after he has discovered the defect of title; and will be debited with the rents which he has received. The purchaser will also be protected in Equity against any person, who knowing his own title, encourages, or fraudulently permits the former, in ignorance of it, to lay out money in improving the property: but when a party has once given a

(t) *Kuwarji v. Moti Haridas*, I. L. R., 3 Bom. 234.

(u) *Paran Chandra Pal v. Karunamayi Dasi*, 7 B. L. R., 90.

(v) *Per* NORMAN and KEMP, J. J. in *Bhoyrub Chunder Sen v. Anandmoyee Chowdhraia*, 1 Marsh., 494.

distinct notice of his claim, and the purchaser subsequently lays out money, it lies on him to show that the other has abandoned, or given reason to believe that he has abandoned, his claim; and this whether the claim extend to the entirety, or only an undivided part of the estate. Nor need the notice disclose the particulars of the claimants' title. (v)

Where a purchaser acquires merely a temporary or partial interest in the land, his expenditure, being referrible to that interest, will give him no additional rights as against the reversioner or joint tenant. (w)

In the maxim "*Ignorantia juris haud excusat*" the word Mutual mis- "*jus*" has the sense of general law or of private take. right according to circumstances. Where an agreement is made in mutual mistake, the plaintiff though there is no fraud was entitled to have it set aside. (x)

However nice the distinction between the rights of a purchaser under a voluntary conveyance and those of a purchaser under an execution sale may be, it is clear that a distinction may, and in some cases, does exist between them. It is sufficient to instance the seizure and sale of a share in a trading-partnership at the suit of a separate creditor of one of the partners. The partner could not himself have sold his share so as to introduce a stranger into the firm without the consent of his co-partners, but the purchaser at the execution-sale acquires the interest sold, with the right to have the partnership accounts taken in order to ascertain and realize its value. The same principle may and ought to be applied to shares in a joint and undivided Hindu estate, and it may be so applied without unduly interfering with the peculiar *status* and the rights of the co-parceners in such an estate, if the right of the purchaser at the execution sale be limited to that of compelling

(v) Dart on V. and P. pp. 757, 911—12.

(w) *Duke of Beaufort v. Patrick*, 17 Beav. 75; *Pillary v. Armitage* 12 Ves 78. See *ante* p. 18 note (f). [sec 20,

(x) *Cropper v. Phillips*, L.R. 2, H. L., 170; The Indian Contract Act,

the partition, which his debtor might have compelled, had he been so minded, before the alienation of his share took place. (y)

There is a great distinction between a private sale in satisfaction of a decree and a sale in execution of a decree. In the former, the price is fixed by the vendor and the purchaser alone; in the latter the sale must be by public auction conducted by a public officer, of which notice must be given as directed by the Act, and at which the public are entitled to bid. Under the former, the purchaser derives title through the vendor, and can not acquire a better title than that of the vendor. Under the latter, the purchaser, notwithstanding he acquires merely the right, title, and interest of the judgment-debtor, acquires that title by operation of law *adversely* to the judgment-debtor, and freed from all alienations or incumbrances effected by him subsequently to the attachment of the property sold in execution. Under a private sale by a judgment-debtor of

What passes under a private sale by a judgment-debtor. property attached in execution, a purchaser acquires no better title than his vendor possesses, that is, he buys subject to any alienation or incumbrance effected since the date of the attachment. Under an execution-sale, a purchaser acquires title by operation of law *adversely* to the judgment-debtor, and freed from such subsequent alienation or incumbrance. (z)

The maxim of English law, that what is at any time affixed to the land becomes a part of it, is not recognized by the statute or common law of India; and in all actions connected either with the revenue or rent of the land, or with its sale and purchase, it has never been held valid that buildings and erections, by whomsoever made, should go absolutely and necessarily with the land. (a)

Parties who stand by and permit another to hold himself out to the world as the real proprietor of their estate, and thus

(y) *Per* SIR J. COLVILLE in *Deendyal Lal v. Jugdeep Narain Singh*, L. R. 4, I. A., 255; I. L. R., 3 Cal., 209. [p. 107, 118, P. C.]

(z) *Per* SIR BARNES PEACOCK in *Sannial v. Ghose*, I. L. R., 7 Cal.,

(a) *Sev. Rep.*, 53; See also 6 W. R., 228; 15 W. R., 360; B. L. R., Sup. Vol. (F. B. R.) 595; 14 B. L. R., 201; 6 Bom. A. C. J., 80.

induce persons innocent of the fraud to lend their money upon such faith, are not entitled to any consideration from 'a Court of Equity and good conscience' (b)

A purchase from a minor is not *ipso facto* invalid. The acts of a minor are only voidable and not absolutely void. Until a transaction by a minor was avoided by some distinct act upon attaining majority, it must be considered valid. (c)

If a vendee purchases for valuable consideration, and without notice of the *benami*, from one who in the eyes of the world, is the absolute owner of a property, and who holds that property, to all appearances, under a good and sufficient title, he would be protected from the subsequent acts of the real owner or of his heir, both of whom were parties to the fraud; and that his purchase would hold good against any subsequent sale made by them. Where the defect in the title was a latent one, which the plaintiff (purchaser from the ostensible owner) could not by any reasonable inquiry, have discovered, the party who assisted in deceiving him, could not take advantage of his own fraud, and sell to another what has already been made over for value to the original purchaser. (d)

Benami transactions are a custom of the country, and must be recognized, meanwhile the extent of their compatibility with an honest purchase, depends upon the peculiar circumstances of each case.

There is no fraud in a purchaser securing the assent both of the ostensible and beneficial owners to his purchase, so as to acquire a good title. (e)

In the case of a benami purchase, the mere use of the *furzee* name is sufficiently disposed of, if the party whose name is used sets up no claim, and if there appears to have been

(b) *Nundan Lall v. William Taylor*, 5 W. R., 37; See also *Nidhee Singh v. Bissonath Dass*, 24 W. R., 79.

(c) *Hari Ram v. Jitan Ram*, 8 B. L. R. A. C., 426

(d) *Mr. L. Rennie v. Gunga Naran Chowdhery*, 3 W. R., 11; See also *Rakkhal Dass Modak v. Bindoo Bashinee Debya*, Marsh., 293; *Bhugwan Dass v. Upooh Sing*, 10 W. R., 185.

(e) *Kales Mohun Paul v. Bholanath Ohuckladar*, 7 W. R., 138.

continued possession on the part of the person claiming to be the beneficial owner. (f)

Where property was sold nominally by benamidars, but in reality by the real owner, and the consideration was the debts due from him to the vendee, the sale was held to be perfectly legal as against the real owner, and therefore as against creditors seeking to execute their decree against him after such sale. (g)

If A has a mortgage upon two different estates for the same debt, and B has a mortgage upon only one of the estates for another debt, B has a right to throw A in the first instance for satisfaction upon the security which he, B cannot touch, at least where it will not prejudice A's rights or improperly control his remedies. A subsequent purchaser of one of the estates has just as great an equity as an incumbrancer. (h)

If a purchaser, although he may be a purchaser for value, has actual or constructive notice of a trust, he is bound by it to the same extent and in the same manner as the person from whom he purchases; and when there is a person in possession of an estate other than the nominal owner (*i. e.* the person in whose name the title-deed is), the purchaser is bound to enquire what is the nature of his possession; otherwise he takes subject to the rights of the person in possession. (i) The equities are the same where there is a person in possession as the object of a charitable trust and under the trust.

"If," said Lord Hardwicke, "a person will purchase with notice of another's rights, his giving a consideration will not avail him, for he throws away his money voluntarily, and of his own free will." (j) Notice binds a purchaser, and he will be

(f) *Mt Hoymobutty Dossee v. Srikissen Nundy*, 14 W. R., 58.

(g) *Monohur Dass v. Bhikaree Bhagut*, 24 W. R., 253.

(h) *Per* NORMAN, J. in *Bishonath Mukerjee v. Kisto Mohun Mukerjee*, 7 W. R., 483; See also Act IV. of 1882, sec. 81.

(i) *Per* COUCH, C. J. *Hakeem Meah v. Bejoy Patnee*, 22 W.R. 8, 189; 6 Bom., 59; *Luteefun v. Bego Jan*, 5 W. R., 120. See also *Jones v. Smith*, 1 Hare 43; *Taylor v. Stibbert*, 2 Ves Jun 437, 440.

(j) *Mead v. Lord Orrery*, 3 Atk., 238; Sugden's V. & P. 11th Ed., 1031.

affected with any incumbrance on the estate if he had notice of it when he purchased, (k) or of a lien for unpaid purchase-money. (l)

The fact of a purchase of land under a deed of sale being *bonâ fide* and without notice of a prior charge, does not pass the land free from the prior charge. (m)

A purchaser without notice from a purchaser with notice is not affected in Equity. He is in the same position as if he had himself originally purchased without notice, and the fact that the sale to him was fraudulent does not affect him. Nor is a purchaser with notice from a purchaser without notice liable, the reason being, Lord Hardwicke says, to prevent stagnation of property (n)

Purchaser without notice from purchaser with notice.

Purchaser with notice from purchaser without.

If a purchaser, however honest, on the completion of his purchase, acquires a defective title, the Court will not allow that defective title to be strengthened, either by his own fraud, or by the fraud of any other person. (o)

No strengthening of title by fraud.

It is a rule of Universal Equity, and not one peculiar to English Courts, that in order to enable the real owner of property to recover from a purchaser for value from a person allowed by the real owner to hold himself out as the owner, he must prove either direct or constructive notice of the real title, or that there existed circumstances which ought to have put the purchaser on an enquiry that, if prosecuted, would have led to a discovery of the real title. (p)

Notice. Equitable doctrine of Secret Ownership.

Where property is bought from a wife as the ostensible owner, the husband consenting to the sale and the transaction is *bonâ fide* on the part of the purchaser for a consideration, the purchase is a good one, even if the property is not the wife's but the husband's. (q)

Purchase from ostensible owner.

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- (k) *Mancharji Sorabji Chulla v. Kongseoo*, 6 Bom. H. C. R., O. C., 59.
 (l) *Yellappa-bin-Basappa v. Mautappa-bin-Basappa*, 3 Bom. A. C., 102.
 (m) *Maheshwar Bux Singh v. Bhika Chowdhery*, B. L. R. Sup. Vol. 403.
 (n) *Dayal Jaidj v. Jivraj Ratansi*, I. L. R., 1 Bom. 237. [of Trusts, 294.
 (o) *Per JAMES, L. J., Heath v. Crealock*, L. R., 10 Ch. 33; *Agnew's Law*
 (p) *Ramkumar Koondoo v. McQueen* 11 B. L. R., 53 (P. C.) 18 W. R., 166
 (q) *Shaikh Golam Russool v. Shaikh Abdool Ruheem*, 15 W. R., 19.

Where a purchaser claims to hold land which he has purchased from a third person on the ground that the owner of such land has acquiesced in the sale, the purchaser must show clearly that the real owner was aware of the sale at the time it took place. (r)

Where rights of ownership had been exercised for a series of years by the husband, and never by the wife, over property which had descended from his wife's father (his own uncle), the husband having mortgaged the property and dealt with it in all respects as if he were the owner, and the wife possessing none of the documents which she would have been able to produce if she had acted as the owner : it was held that she had no such interest in the property as entitled her to maintain a suit to recover possession of it after it was sold in satisfaction of the husband's debts. (s)

The purchase of property in the name of an idol, where the purchase-money does not come from funds appropriated to the use of the idol, is not tantamount to a dedication of the property to the idol; it may be a *benami* or merely fictitious transaction. (t)

If relief is to be given in India to a honest purchaser in a suit to impeach his title, it must be given not on account of any distinction between a legal and equitable estate, but because the innocent purchaser is supposed to have been the victim of fraud on the part of the vendor, and of laches on the part of the prior incumbrancer, who might have taken possession or registered his mortgage-deed, and so have given notice of his lien. (u)

An estate of inheritance will be conveyed by words imperfectly describing such an estate, if it was intended that the grantee should have such an estate ; and if an estate were given to a man simply without express words of inheritance, it would,

(r) *Savak Lal Karsandas v. Ora Nazumuldeen*, 8 Bom. O. C. J. 77.

(s) *Ozeeroonnissa Bibee v. Ramdhun Roy*, 11 W. R., 17.

(t) *Brojo Soondurjee Debia v. Ranees Luckmee Komparee*, 11 W. R., 13.

(u) *Per MELVILL, J.*, I. L. R. 6 Bom. 206 ; 8 W. R., 408.

in the absence of a conflicting context, carry by Hindu law an estate of inheritance. (v)

The shebait of a *tahsq* dedicated to the religious services of an idol, has not the legal property, but only the title of manager of a religious endowment. In the exercise of that office she cannot alienate the property, though she may create proper derivative tenures and estates conformable to usage. (w)

Mesne profits are always recoverable from a person who has enjoyed them, even though he has been in *bonâ fide* possession without knowledge of the defect in his title. He would (supposing him to have been the victim of a fraud) still have his remedy against his vendor, unless he had bought negligently and without sufficient enquiry, in which case the maxim of *Caveat Emptor* would apply. (x)

Where in a suit for partition, it appeared that the vendor of the portion sued for had kept the vendee out of possession, the vendor, though liable for mesne profits, was not in the position of trustee of the rents for the party kept out of possession. (y)

Where a vendor is out of possession at the time when the property is sold, the purchaser is entitled to commence a suit for the recovery of the property. (z) Similarly a lessee, whose lessors have never been in possession of the lands comprised in the lease, has a right to bring an action to establish the title of his lessors, if he makes them co-defendants in the suit along with the parties in possession. (a) The late Justice Dwarkanath Mitter in laying down this rule observed that every person has a right to sue for the protection of his own interests ;

(v) *Per* WILLES, J. in *Tagore v. Tagore*, P. C. 9 B. L. R., p. 395.

(w) *Maharanees Shebessary Debyay. Mathuranath Acharja*, 13 M. I. A. 270.

(x) *Per* KEMP and GLOVER, J. J. in *Mugun Ohunder Chutturaj v. Surbessur Ohuckerbutty*, 8 W. R., 479 ; See also W. R., F. B., 40 ; 8 W. R., 450.

(y) *Nilkamal Lakuri v. Gunomani Debt*, 7 B. L. R. P. C., 113 ; Pandit's P. C. J., Vol. II. p. 652.

(z) *Aulock Monee Dassia v. Alock Monee Dabya*, 25 W. R., p. 48.

(a) *Frankisto Dey v. Bessumbher Sen*, 11 W. R., 81 ; 2 B. L. R., A. C., 207.

* Where there is a right there is a remedy. If the plaintiff has a right,

and if for the determination of those interests it becomes necessary to enquire into the title of the person through whom he claims, the Court is bound to make the enquiry. Sir Barnes Peacock in delivering the judgment of the Full Bench in the case affirmed this principle of law and said : " The lease gave to the plaintiff a right of possession assuming that the lessors had a right of possession † If they transferred the right which they had to the lessee, and the lessee was kept out of possession by the defendants, the lessee had a right of suit against the defendants to recover the possession from them. If the lessors had no right of possession—as for instance, if they were barred by limitation—the suit would, of course, fail on the ground that the lessors had nothing which they could convey. It is said that the lessors ought to have been made co-plaintiffs, but the Courts cannot compel a man to become a plaintiff against his will."

On a sale in execution of a decree, the property in the thing sold passes to the purchaser ; and there is nothing in either the Hindu or the English law which debars a third person from taking an assignment of such property from the auction-purchaser, albeit it has never been reduced into possession by him. The sale of such a title was *not* a speculative one, nor was it " against justice and public policy as tending to promote unnecessary litigation." (b) Want of possession in the vendor does not, therefore, render a transfer of property *ipso facto* void, though it may be a circumstance which weakens the presumption of the *bona fides* of a transaction.

he must of necessity have a *means* to vindicate and maintain it, and a *remedy*, if he is injured in the exercise and enjoyment of it ; and indeed it is a vain thing to imagine a right without a remedy, for want of right and want of remedy are reciprocal. *Per* LORD HOLT in *Ashby v. White*, 2 Ld. Raym, 953 ; See also Smith's Leading Cases.

† In England rights of entry were not assignable at common law but were made alienable by Deed, 8 and 9 Vic c. 106.

(b) *Gorind Raghunatha v. Gorinda Jagaji*, I. L. R., 1 Bom. 500 ; See also *Bekan Singh v. Mt Parbutty Koor*, 22 W. R., 99 ; *Lokenath Ghose v. Jugobundhoo Roy*, I. L. R., 1 Cal., 297.

CHAPTER III.

OF TITLE AND THE INVESTIGATION THEREOF.

The title to be made out by the vendor must be free from reasonable doubt. "To enable Equity," said Lord St. Leonards, "to enforce a specific performance against a purchaser, the title to the estate ought, like Cæsar's wife, to be free from suspicion. It has, therefore, become a settled and invariable rule that a purchaser shall not be compelled to accept a doubtful title."

The Transfer of Property Act provides that the seller shall be deemed to contract with the buyer that the interest which the seller professes to transfer to the buyer subsists and that he has power to transfer the same. (c) It is implied in the contract that the purchaser is to have a good title—*i. e.* "a title free from reasonable doubt;" and whilst the bargain is not consummated by a conveyance, the intending purchaser may, if the title proves defective, withdraw from the contract and recover any purchase-money which he has paid. (d) Where the purchaser having had an opportunity of investigating the title falls into an error, he has to bear the consequences himself, provided the error has not been caused or contributed to by the vendor.

To make out a title to property, it is not sufficient that the party for whom, or in whose name, the vendor alleges that he bought the property, does not come forward to dispute the allegation, but it is necessary for the vendor either to produce a subsequent conveyance to him from the alleged benamidâr, or to procure the consent and concurrence of such benamidâr to the deed of sale to be executed by the vendor. (e)

(c) Act IV. of 1882 sec. 55, para. (2).

(d) The Specific Relief Act, sec. 25 (b).

(e) *Mt Fureedunnissa v. Ham Onogra Singh*, 21 W. R., 19.

Where a Hindu executes a kabalah in favour of another at a time when he has no title to the property, his subsequently becoming entitled as heir would not make the kabalah good. (f)

Though an individual vendee may consent to accept a defective title, it is doubtful whether the Directors of a Railway Company can do so. (g)

A simple uninterrupted possession for sixty years would not create a sufficient title against all the world, where the claimant is a reversioner or a remainder-man and had no right to enter within that period. So where an estate for life, or for years, extends to sixty years and upwards, the reversioner might sue and recover the property upon the determination of such estate.

If the vendor be in fact possessed of documents of his title prior to sixty years, he cannot withhold them from the purchaser, should they be called for ; for a purchaser for a valuable consideration has a right to all the information concerning the title which the vendor can furnish him with, and cases have occurred which show the possibility of a title being defective and impeachable, notwithstanding an undisturbed possession of fifty or sixty years, by reason of remote claimants expectant upon the determination of a particular estate, which had continued for a much longer period. (h) Take the case of a childless Hindu widow in Bengal inheriting a zamindari of her husband at 15 or 16 years of age and selling the whole or a portion thereof when major to a stranger to defraud the heirs of her husband. Suppose the widow to live till the advanced age of 90 years. The purchaser from the widow very soon sells the property to another, who again conveys it to a third person ; and thus the property passes through many hands before it reaches the last holder, who continues in possession for a period of fifty or sixty years till an action for ejectment is brought against him upon the demise of

(f) *Kali Chunder Chowdhery v. Shib Chunder Bhaduri*, 15 W. R., (P. C.) 12; 6 B. L. R., 501. See ante p. 8.

(g) *Eastern Counties Railway Co. v. Hawkes*, 5 H. L. Cas. 231.

(h) *Goodright v. Torrister*, 1 Taunt 585.

the widow by the heirs of her husband. It can never be safe for a purchaser from such ostensible owner in possession to be satisfied with evidence of mere possession for fifty or sixty years. The antecedent title-deeds must be enquired after and examined by a cautious purchaser. (i) Such cases however are very rare.

The presumption in favour of the genuineness of documents, offered in evidence in India, is very weak; but still the presumption is not in favour of forgery. When, therefore, a long series of documents is produced showing a reasonable origin of title nearly a century ago, a regular deduction of that title, and a possession consistent with it, confirmed by the all-important fact of such possession existing at the time of the adverse party's commencement of title, evidence of intrinsic improbability should be very strong indeed which is to counterbalance the weight of such testimony. (j)

Trustees for sale are bound, like other persons, to make out a good title; they may of course protect themselves by express stipulations. "It would be prudent," says Mr. Lewin in his learned work, "before proceeding to the execution of the trust to take the opinion of counsel whether a good title can be deduced (k)

It is a well established presumption of Hindu law that a family (once a joint) retains that *status*, unless it is shown to have become divided; and that the ancestral family property remains joint, unless it is shown, by partition or otherwise to have become separate, and the *onus* lies on the party alleging separation. The mere registration of the name of one member of a joint family as Lumbardar or Zamindar for fiscal purposes does not establish his exclusive proprietary right to that property as against the other members of the joint-family. (l)

Where property is proved to be ancestral the mere registration of one brother as proprietor is of little value as supporting

(i) *Dwarkanath Bysack v. Dinobundoo Mullick*, 18 W. R., 305.

(j) *Wise v. Bhobun Moyee Debya*, 10 M. I. A., 165. S. C., Pandit's P. C. J., Vol. II, p. 92; S. P. C. J., 563.

(k) *Agnew's Law of Trusts in British India*, 170; Lewin 7th Ed., 306.

(l) *Mt Cheetha v. Mithen Lall*, 11 M. I. A., 369.

a case of the property not being joint, and the burden of proving that the property is not joint, rests on him who alleges that to be the case. (m)

Lands situate within a zamindari must *prima facie* be considered as part of the zamindari; and it is for those who insist on the separation of lands from the general lands of the zamindari and on their settlement as a *shikmi* taluq, to establish their title. (n)

Where the plaintiffs never professed to be selling a freehold, or an unenforceable tenure, it was for the defendant to have satisfied himself before the sale as to the precise nature and details of the tenure. If persons, without satisfying themselves as to the real title to the property, choose to buy at sales where the party selling professes to sell merely his "right title and interest," such as it is, they have no one but themselves to blame, if they afterwards find they do not get such a title as they could have wished. At such a sale it is *before* he bids, and *not* afterwards, that an intending purchaser should enquire into the nature of the title which the vendor can make out. (o)

The law in India has not enabled a purchaser of land to look *only* to the apparent title on the Collector's books, or the presumed title of the owner in possession. (p) But in a country where benami transactions are so common, an intending purchaser of a piece of land, taluq or zamindari ought to satisfy himself as to whose name is on the Collector's register, and who gives the receipts for rent to tenants thereof. At any rate it is but reasonable that the purchaser should in all cases exercise due care and diligence, and should take "some precautions to ascertain whether he is dealing with the real owner." (q)

The grand difficulty in purchasing land in Bengal is to make a title. A purchaser can never be sure that some one will

(m) *Umritnath Chowdhery v. Goursonath Chowdhery*, 13 M. I. A., 542.

(n) *Wise v. Bhobun Moyes Debba*, S. P. C. J., 563.

(p) *Per* SIR R. COUCH, in *Sikhar v. Biswas*, 9 B. L. R., 145.

(q) *Per* LORD KINGSDOWN in *Varden Seth Sam v. Luckpathy Royjee Lallab*, 9 M. I. A., p. 323; S. C. Pandit's P. C. J., Vol. I., 869.

(g) *MARSH'S Lectures on Indian Law*, p. 104.

not start up and declare the seller to have been a mere man of straw. In truth, too often a litigious person buys from a man of straw a nominal property which is not in his possession. The only safe title is a purchase under a sale for arrears of revenue. (r)

In India a purchaser or mortgagee from a Hindu widow, from the guardian of a minor, from the manager of a joint family, or from a benamidâr, if he has acted *bonâ fide*, has paid valuable consideration, and has made such inquiry as a prudent man would make, will be protected from any claim to impeach the transaction on the ground that these persons had not the powers of alienation which they assumed to exercise. These are cases of persons who have the ostensible power of dealing with property, and though that power is in fact limited, its exact limits depend on circumstances which it would be exceedingly difficult for an intending purchaser or mortgagee to discover. (s)

The Courts of Justice in India, therefore enforce the doctrine of "due care and diligence" on the part of purchasers and whenever they are found to have exercised such care and diligence, ample protection is given them to shield their title from an impeachment. The cases in which protection is given upon equitable considerations to honest purchasers and mortgagees when their title is impeached have been thus classified by Mr. Markby in his learned lectures on Indian Law :—

Sales by guardians, trustees, managers, &c.

property.

Sales by benamidars.

Sales of Titles impeachable for Fraud

I. Sales by persons who are not the owners and are known not to be the owners, but who are believed to have a power to dispose of the

II. Sales by persons who are not the owners but are believed to be the owners ; and

III. Sales by persons who are the owners, but whose ownership is liable to be defeated.

A short exposition of all these different kinds of sales with case-law thereon has been given in a succeeding portion of this treatise.

(r) SIR GEORGE CAMPBELL, on "The Tenure of Land in India,"

(s) MARKBY'S Lectures on Indian Law, p. 104.

The Courts in India show "a manifest tendency to afford a liberal protection to persons honestly taking a title from the benamidârs." "I think it may be said with certainty," says Mr. Markby, "that where property stands in the name of A (for instance), and A has signed the rent receipts, and is registered as owner in the Collector's books, and there is nothing shown to have been brought to the notice of the purchaser or mortgagee which would put an ordinarily prudent man upon further inquiry as to A's title, the purchaser or mortgagee from A is safe."^(t) The equity of a *bonâ fide* purchaser from an ostensible owner will be fully dealt with when we come to treat of the law of estoppel as applicable to vendors and purchasers.

A sale without ownership is forbidden by the Hindu law, but there are no express *dicta* in it which provide for the deduction of a good title by the vendor. No such rule appears to exist in the Hindu law, and in contracts between Hindus for the purchase and sale of land in Bombay the intention of the parties must be ascertained from the terms of the agreement, without regard to any implication. When therefore a vendor sues for specific performance of a contract, the purchaser is entitled to an enquiry as to the vendor's title ; but in considering the nature and extent of the enquiry which should be made, the Courts must have regard to the usage of the place, the manner in, and the titles by, which land is held, the law of limitation, and the modes of transfer which have been in use, as well as any other circumstances which can fairly be considered to have been within the knowledge and contemplation of the parties when the agreement for sale was made.^(u)

In order that a purchaser of immovable property from a Hindu in the island of Bombay may be entitled as against the beneficial owner of such property to set up the defence of being a *bonâ fide* purchaser without notice, he must show that he has made all proper inquiries into the title, and as to the state of

(t) MARKBY'S Lectures on Indian Law, p. 103.

(u) *Dersi Ghela v. Jivraj Mahandas*, 2 Bom. H. C. Rep., 430.

family of his vendor, and of his vendor's predecessors in title for a period of twelve years at least before the date of his purchase. (v)

A grant in innaam-i-altamgha to N and his children, "and their descendants in lineal succession, for generation after generation, in perpetuity and for ever," which was unburdened with any condition as to prospective service, and free from any religious, charitable, or other trust, was held to confer an alienable estate. (w)

The purchaser or mortgagee should never omit to observe the common precaution of asking to see the title-deeds; and unless their loss or absence is satisfactorily accounted for by the vendor or his agent, the purchaser will be bound by his negligence. (x)

A purchaser is entitled to relief on account of any *latent* defects in the estate, or the title to it, which were not disclosed to him, and of which the vendor or his agent was aware.* As a provident vendee, however, one ought not to trust to the description of the vendor, or his agents, but the purchaser should examine and ascertain the quality and value of the property and have the title thereto investigated and approved by lawyers.

If a purchaser is damnified by gross want of skill in an attorney, or by his neglect to search for incumbrances, he or his administrator may recover against the attorney for any loss which he may sustain. (y) But where the attorney has acted under the advice

(v) *Sarak Lal Karsandas v. Ora Nazimuddin*, 8 Bom. H. C. R. O. C. J., 77.

(w) *Krishnamurari Ganesh v. Rangrao*, 4 Bom. Rep., A. C. J., 1.

(x) *Somasundara Tambiran v. Sakkarai Pattan*, 4 Mad. H. C. Rep., 373.

(y) *Knight v. Quarles*, 4 Moore, 541. Addison on Torts 3rd Ed., 922.

* Under sec. 55 of the Transfer of Property Act the seller is bound, in the absence of a contract to the contrary, to disclose to the buyer any material defect of which the seller is, and the buyer is not aware, and which the buyer could not with *ordinary care* discover; to produce to the buyer on his request for examination all documents of title relating to the property which are in the seller's possession or power; and to answer to the best of his information all relevant questions put to him by the buyer in respect to the property or the title thereto. A buyer, on the other hand, is also bound to disclose to the seller any fact as to the nature or extent of the seller's interest in the property of which the buyer is aware, but of

of counsel, upon subjects properly within the province of counsel he is safe. Barristers, however, are not liable to their clients for

Counsel not liable. any blunders which they commit, however gross, for their fees are considered purely gratuitous and honorary. (z) But if a barrister intentionally does a wrong, and acts with malice, fraud or treachery in the discharge of his professional duties, he will be responsible, like every other wrongdoer, for the mischief thereby occasioned. (a)

In order to save expense the same person frequently acts as attorney both for the vendor and the purchaser. But the practice has been denounced by Courts of Equity in England and as a rule the vendor's attorney should not be employed by the purchaser, for he may not disclose a defect in the title although he is conscious of it. "Another powerful reason," says Lord St. Leonards, "why a purchaser should not employ the vendor's attorney is, that if the vendor be guilty of a fraud in the sale of the estate, to which the attorney is privy, the purchaser, although it be proved that he was innocent, will be responsible for the misconduct of his agent." (b)

If an attorney of a vendor of an estate knowing of incum-
Non-disclosure of incumbrances by an Attorney. brances thereon, treat for his client in the sale thereof, without disclosing them to the purchaser, knowing him a stranger thereto, but represents it so as to induce a buyer to trust his money upon it, a remedy lies against him in law and equity : to which principle it is necessary for the Court to adhere, to preserve integrity and fair dealing between man and man, most transactions being by the intervention of an attorney or solicitor. (c)

which he has reason to believe that the seller is not aware, and which materially increases the value of such interest. An omission to make these disclosures is declared to be "fraudulent," Act IV of 1882, sec. 55, para. (1) cl. (a) and para. (5) cl. (a)

(z) LORD ST. LEONARD'S Handy-Book of P. Law, 7th Ed. p. 29.

(a) *Swinfen v. Lord Chelmsford*, 29 Law J., Exch 382.

(b) *Sugden V.* & P. 11th Ed. p. 7. See *Hormusjee Temulji v. Mankuvarbas*, 12 Bom. H. C. Rep, 262—67. [5 W. R., 289.

(c) *Per LORD HARDWICK*, 1 Ves 96. See *Ameer Ali v. Syed Ali*,

Section 1.—Incidents of Title.

The title of a person in immovable property may accrue to him (A) by *descent* or inheritance in case of intestacy of the former owner ; (B) by *devise* where such owner leaves a will or codicil ; (C) by deed of gift, purchase, or other act *inter vivos* operating in *presenti* or *in futuro* ; (D) by adverse possession or non-claim for *twelve* years, and (E) by operation of law. A widow's dower under the common-law of England is a charge upon her deceased husband's real estate. The property of an Insolvent vests in the Official Assignee as soon as the vesting order is made ; and all purchasers under statutory sales take adversely to the former proprietor by operation of law.

(A)—DESCENT.

According to the law administered in British India, on the death of any owner being absolute owner, any question touching the inheritance from him of his property is determinable in a manner personal to such last owner. This system is made the rule for Hindus and Muhammadans by positive Statutes, Acts or Regulations. (d) The Indian Succession Act upholds the same principle and secures to all owners of real property in India, whether domiciled there or not, the benefit of its provisions. There are besides other cases in which the succession is regulated either according to tribal usage as amongst the Jains and some of the aboriginal races of India, or according to *kulachar* or family custom confirmed by a course of judicial decisions. Immovable property, therefore, being originally, and remaining alienable, may by act *inter vivos* pass to any purchaser, whatever his

(d) 21 Geo. III. Chap. 70 sec. 17 ; 37 Geo. III. Chap. 112 sec. 13. The Bengal, Bombay, and Madras Regulations on the subject contain similar provisions. See *Collector of Maunsulpatam v. Cavalry Vencata Narainappa*, 8 M. I. A., 500 ; 2 W. R. P. C., 59.

nationality might be. It might by such transfer be held in succession by a British subject, by a European, by an Armenian, by a Jew, by a Hindu, by a Muhammadan or by a Parsi, or by "any other person, whatever his race, religion or country."

Lands belonging to a zamindari granted by the zamindar under an absolute hereditary mokurrari tenure, do not, on the death of the grantee without heirs, revert to the Zamindar; nor does the zamindar, under such circumstances, take by escheat a tenure subordinate to and carved out of his zamindari. Where there is a failure of heirs, the crown, by the general prerogative, will take the property by escheat, subject to any trusts or charges affecting it; and there is nothing in the nature of a mokurrari tenure which should prevent the crown from so taking it subject to the payment of the rent reserved under it. (e)

The *lex loci* of India, like the *lex loci* of all other countries, is applicable to the immovable property of foreigners sojourning but not domiciled in India. (f) The Indian Succession Act, —Act X. of 1865,—is the *lex loci rei sitæ* regulating the descent of real property in British India of all persons other than Hindus, Muhammadans and Buddhists. (g) The Parsis have a law of succession of their own embodied in Act XXI. of 1865.

Act XXI. of 1850 was passed by the Indian Legislature to protect perverts and outcastes from disinherision by the operation of the personal law of their ancestors.*

Where an Englishman held certain lands in India by instruments of grants called *pattahs*, by which a perpetual right of occupancy was given to the grantee subject to the payment of

(e) *Sonett Koor v. Dinmut Bahadur*, 1 L. R., 1 Cal., 391.

(f) *Per MARKBY, J. in Miller v. Administrator General of Bengal*, 1 L. R., 1 Cal., 420; See secs. 5 and 44, Act X. of 1865.

(g) Secs. 5 and 331, Act X. of 1865.

* So much of any law or usage now in force within the territories subject to the Government of the East India Company as inflicts on any person forfeiture of rights or property, or may be held in any way to impair or affect any right of inheritance, by reason of his or her renouncing, or having been excluded from the communion of any religion, or being deprived of caste, shall cease to be enforced as law in the Courts of the East India Company, and in the Courts established by Royal Charter within the said territories.—Act XXI of 1850, sec. 1.

certain annual fixed rents, and to forfeiture in case of non-payment, the estate being descendible to heirs and capable of being alienated, sold, or disposed of by the grantee, these lands being further held under a *zamindar* to whom the rent was payable, and who held immediately from the Government under a similar tenure : *Held*—that the interest in the estate was of the nature of fee-simple and descended to the person who would be heir-at-law in England, and that no part thereof could pass by a will (to which the Statute of Frauds applied) attested by only two witnesses. (*h*)

In cases of intestacies occurring before the 1st of January 1866, the English rules of Succession to real property apply to the descent of estates in land held by European British subjects in India. (*i*) Prior to that date the Jews, and the Armenians in the Presidency towns were subject to British law ; and the devolution or devise of land in Calcutta amongst them was determined by that law. (*j*) It must always be borne in mind that the provisions of the Indian Succession Act do not apply to any will made, or any intestacy occurring before the first day of January 1866, and that the fourth section thereof which provides for the absolute severance of the rights and liabilities of the husband and the wife, does not apply to any marriage contracted before that day. (*k*)

A Hindu by conversion to Christianity becomes completely severed from his family ; but in spite of his separation, the *lex loci* Act (XXI of 1850) secures to him his inheritance in all cases of intestacy of his ancestor. All Statutes, Regulations and Acts which prescribe that the Hindu law shall be applied to the Hindus and the Muhammadan law to Muhammadans must be understood to refer to Hindus and Muhammadans not by birth merely, but by religion also. Prior to the coming into operation of the Indian Succession Act 1865, the succession

(*h*) *Gardiner v. Fell*, 1 M. I. A., 299. Pandit's, P. C. J., 120.

(*i*) See Act X. of 1865 sec. 331.

(*j*) *Musleah v. Musleah*, 1 Bulnois, 224 ; *Stephen v. Hume*, Fult, 420 ; *Emin v. Emin*, Mort, 2nd Edition 242 ; *Arratou v. Jahanus*, *ib* , 19.

(*k*) Act X. of 1865 sec. 331, and sec. 4.

of Native Christians was governed either by the English law or the law of their ancestors, according as they adopted the manners and habits of the English people or adhered to the customs and usages of their progenitors.

In the leading case of *Abraham v. Abraham* Lord Kingsdown in delivering the judgement of the Privy Council observed : " Although it is not competent to parties to create, as to property any new law to regulate the succession to it *ab intestato*, yet when there are different laws as to property applying to different classes, parties ought to be considered to have adopted the law as to property, whether in respect to succession *ab intestato* or in other respects, of the class to which they are shown to belong. Nothing can be more just than that the rights and interests in a person's property and his power over it, should be governed by the law which he has adopted, or the rules which he has observed. Tribunals which have a discretion and have no positive *lex fori* imposed on them should rather proceed on what actually exists than on what has existed, and in forming their presumptions have regard rather to a *man's own way of life* than to that of his predecessors. ' Though race and blood is independent of volition, usage is not.' (1)

The descent of Hindu immovable and movable property, as a general rule, is the same—the person entitled to the one is entitled to the other ; whilst " real estate " in England goes in one line of descent, and chattels, real or personal, may go in another. Each class of Hindu property is primarily liable to debts and execution, whilst the contrary doctrine prevailed in respect of English real property. So an administrator or executor of a Hindu estate takes both movable and immovable, whilst the executor or administrator in England takes only the personalty or movable property, and freehold or immovable property goes to the heir. (m)

(1) 9 M. I. A., 242—45 ; Pandit's P. C. J., Vol. II., 10.

(m) *Mancharji Pestanji v. Narayan Lukshumanji*, 1 Bom. H. C. Rep. O. C. J., 83.

When a Hindu dies indebted, his estate does not in whole, or in a part sufficient to pay the debt, vest in the creditor as if by hypothecation, but the entire estate absolutely passes to the heirs, with full powers to deal with the whole estate before satisfaction of the debts. The creditor has no lien on the estate preferential to him who takes the estate in pledge from the heirs, nor can he, after the alienation thereof by heirs for *bonâ fide* and valuable consideration, follow it in the hands of the alienee. He has merely a right of suit against the heirs personally who are held liable for the same to the extent of the assets they receive by inheritance. (n)

The Muhammadan law of succession *ab intestato* applies only to the assets which constitute the succession. (o)

The creditor of a deceased Muhammadan cannot follow his estate into the hands of a *bonâ fide* purchaser for value, to whom it has been alienated by the heir-at law, whether the alienation has been by absolute sale or by mortgage. In *Land Mortgage Bank Ltd, plaintiffs v. Roy Lutchmiput Sing, defendant* (p) Mr. Justice Pontifex in following this rule laid down by the Privy Council observed: "No doubt the purchaser must be a *bonâ fide* purchaser, and that is the only question that could be argued in the appeal. The appellants however complain that on the 18th June 1879 they asked permission of the Lower Court to adduce evidence to prove that the defendant's purchase from Shurufoonissa was collusive, which was refused. No charge of fraud was made in the plaint although it is clear the plaintiffs had full knowledge of all the previous circumstances of the case, nor was any issue raised upon that question. The Subordinate Judge refused to allow the plaintiffs to set up a case of fraud for the first time on the 18th June 1879 after witnesses had been examined for the defendant. In our opinion he was justified in so refusing. If fraud had been charged in the

(n) *Zuberdust Khan v. Indurman*, 1 Agra Rep. F. B., 71.

(o) *Nawab Umjad Ally Khan v. Mohumdee Begum*, 11 M. I. A., 557.

(p) 8 Cal. L. R., p. 418.

plaint, it might have been difficult to allow the plaintiffs to make out any other case. By carefully omitting to charge fraud in the plaint they could not afterwards, after all the issues had been settled and the witnesses for the defendant had been examined, be allowed to raise, for the first time, the question of fraud which the defendant had not been called to meet."

In execution of a money-decree against the heirs of a deceased Muhammadan for a debt incurred by him, A purchased certain property which had been allotted, to the widow of the deceased in lieu of dower, and of her share of the inheritance. Previously to the purchase, however, the widow had mortgaged the same property to B, who, at the time of the mortgage, knew of the debt for which the decree was obtained. In a suit by B against A, on the mortgage, it was not shown that there were not assets in the hands of the heirs-at-law to satisfy the debt due to A's vendor. It was held that B was entitled to recover from A. (g) Mr. Justice Romesa Chunder Mitter in delivering the judgment of the Appellate Court thus discussed the question of law in the case :—The plaintiff took a mortgage from one of the heirs of a deceased Muhammadan having notice of an outstanding debt due from her ancestor. Is the mortgage under the Muhammadan law absolutely void ? I do not think there is any authority for holding in the affirmative. In *Syud Buzayet Hossein v. Dooli Chund* (r) the Judicial Committee of the Privy Council, after reviewing many decided cases on the point, laid down the law thus : ' A creditor of a deceased Muhammadan cannot follow his estate into the hands of a *bonâ fide* purchaser for value to whom it has been alienated by his heir-at-law'. But it does not follow from this that such a creditor, under all circumstances, can follow the estate in the hands of a purchaser who had notice of his claim. The purchase *with* notice is *not* absolutely void, but the purchaser takes the property subject to the rights of the creditors whatever they are. The Muhammadan law on the subject is, that, out of the assets of a deceased person, funeral expenses

(g) *Narsing Dass v. Najmooddin Hossein*, I. L. R., 8 Cal., 20—24.

(r) L. R., 5 I. A., 222 ; I. L. R., 4 Cal., 408.

should be defrayed, *first, then* the debts and *then* the legacies. The residue is to be distributed among the heirs. Therefore if the assets in the hands of an executor or the heirs-at-law are not sufficient to discharge a particular debt, the creditor may follow any property in the hands of a purchaser from the executor or heirs-at-law with notice of his claim. In this case it is not shown that the assets in the hands of the heirs-at-law were not sufficient to satisfy the debt due to the respondent's vendor. On the other hand the fact is, that the debt was satisfied by the sale of a portion of the assets in the hands of one of the heirs." It may therefore be laid down as a positive rule of law, that the heir takes an *absolute* title by descent, that he is liable for the debts of his ancestor to the extent of the assets inherited by him, but that such debts are not a charge or lien on the property descended until upon proper legal steps being taken the creditor obtains a decree declaring such charge or lien. Where, however, a sale or mortgage is effected during the pendency of a suit by the creditor, who eventually succeeds in obtaining a decree for payment of his debt out of the estate come to the hands of the heir-at-law, the alienee will be held to take with notice, and will be affected by of the doctrine of *lis pendens*. (s)

The illegitimate son of an Englishman by a Muhammadan woman died in 1863 intestate and without lawful issue, leaving him surviving his mother, his mistress, and several illegitimate children. *Held*, that his property passed to the crown in default of heirs. (t) In this case it was further held that the territorial law of British India is a modified form of English law, aptly described by Mr. Justice Phear as "Indo-English law". (u) Mr. Justice Markby in coming to this conclusion observed: "There exists in this country English law, which is not due to the charters creating the Supreme Courts, and which is not personal law. It is not possible to suggest, as far as I am aware,

English law
sub modo, the
Territorial-Law
of British India.
Escheats.

(s) *Syud Baxayet Hossein v. Doolee & Co.*, 1 L. R., 4 Cal. 402. [O. C., 87.
(t) *Secretary of State v. Administrator General of Bengal*, 1 B. L. R.,
(u) *Hogg v. Greenway*, Cor. Rep., 97; *Nancy v. Burgess*, 1 W. R., 272.

any ground for the existence of that law, except that when this country was brought under English rule, the English law became the territorial law of the country applicable, it is true, in very few instances, because of the very large number of persons who had a personal law of their own, and only in the same modified form in which it is applicable within the city of Calcutta, but still a territorial law. The right of the crown as *ultimus heres* is part of the Indo-English law." On the death of a Brahmin without heirs, the sovereign power in British India is entitled to take his estate by escheat, subject, however, to the trusts and charges previously affecting the estate. (v) The Privy Council in supporting the general right of the Crown to take by escheat in the case of a vacant inheritance, based their opinion "on grounds of general or universal law."

The heir-at-law of a testator, though in terms excluded from benefit under the will of the testator, cannot be excluded from his general right of inheritance without a valid devise to some other person. (w)

The Oudh Estates' Act, 1869, sec. XXII. prescribes a special course of descent to a single heir in the case of intestacy of certain Taluqdars and Grantees of that province.

(B)—DEVISE.

A devise of immovable property to be valid in India must be in accordance with the principles and provisions of Hindu law in the case of Hindus, of Muhammadan law in the case of Muhammadans; and in all other cases must comply with the statutory requisitions of the Indian Succession Act. Certain portions of this Statute has by Act XXI. of 1870 been made applicable to all wills and codicils made by any Hindu, Jaina, Sikh or Buddhist on or after the 1st day of September 1870 within the territories subject to the Lieutenant-Governor of Bengal and in the towns of Madras and Bombay, and to all such wills and

(v) *The Collector of Masulipatam v. Cavalry Vencatu Narainappa*, 8 M. L. A., 526; Pandit's P. C. J. Vol. I., 752; 2 W. R. P. O., 59.

(w) *Jotindra Mohun Tagore v. Ganendra Mohun Tagore*, 9 B. L. R., P. C., 377, 409; L. B. L. A. Sup. Vol. I., 47; 18 W. R., 359.

codicils made outside those territories or limits, so far as relates to immovable property situate within those territories or limits.*

Under the Muhammadan law, legacies cannot be made to a larger amount than *one-third* of the testator's estate without the consent of the heirs, nor can a legacy be left to one of the heirs without the consent of the rest. All debts due by the testator must be liquidated before the legacies can be claimed, for a man must be just before he is generous ; and the payment of legacies to a legal amount precedes the satisfaction of claims of inheritance. An acknowledgment of debt in favour of an heir on a deathbed resembles a legacy ; inasmuch as it does not avail for

*EXECUTION OF "UNPRIVILEGED WILLS"

Sections 46, 48, 49, 50, 51, 55, 57, 58, and 59 of the Indian Succession Act, made applicable to Hindus by the Hindu Wills Act, are as follows :—

46. Every person of sound mind, and not a minor, may dispose of his property by will.

Explanation 1.—A married woman may dispose by will of any property which she could alienate by her own act during her life.

Explanation 2.—Persons who are deaf, or dumb, or blind, are not thereby incapacitated for making a will if they are able to know what they do by it.

Explanation 3.—One who is ordinarily insane may make a will during an interval in which he is of sound mind.

Explanation 4.—No person can make a will while he is in such a state of mind, whether arising from drunkenness, or from illness, or from any other cause, that he does not know what he is doing.

48. A will or any part of a will, the making of which has been caused by fraud or coercion, or by such importunity as takes away the free agency of the testator, is void.

49. A will is liable to be revoked or altered by the maker of it at any time when he is competent to dispose of his property by will.

50. Every testator, not being a soldier employed in an expedition, or engaged in actual warfare, or a mariner at sea, must execute his will according to the following rules :—

First.—The testator shall sign or shall affix his mark to the will, or it shall be signed by some other person in his presence and by his direction.

Second.—The signature or mark of the testator, or the signature of the person signing for him, shall be so placed that it shall appear that it was intended thereby to give effect to the writing as a will.

Third.—The will shall be attested by *two* or more witnesses, each of whom must have seen the testator sign or affix his mark to the will, or have seen some other person sign the will in the presence and by the direction of the testator, or have received from the testator a personal acknowledgment of his signature or mark, or of the signature of such other person ; and each of the witnesses must sign the will in the presence of the testator, but it shall not be necessary that more than one witness be present at the same time, and no particular form of attestation shall be necessary.

51. If a testator, in a will or codicil duly attested, refers to any other document then actually written, as expressing any of his intentions, such document shall be considered as forming a part of the will or codicil in which it is referred to.

more than a *third* of the estate. (x) The Muhammadans have a very elaborate law of gifts and wills of their own and the Indian Succession Act and the Transfer of Property Act preserve the integrity thereof by express provisions. (y)

The extent of the testamentary power of disposition by Hindus must be regulated by the Hindu law. (z) The testamentary power of disposition by Hindus has been established in Bengal by the decision of Courts of Justice. The nature and extent of such power cannot be governed by any analogy to the law of England—the English system being one of the most artificial character, founded in a great degree on feudal rules, regulated by Acts of Parliament, and adjusted by a long course of judicial determinations to the wants of state of society differing, as far as possible, from that which prevails amongst Hindus in India. (a)

55. No person, by reason of interest in or of his being an executor of a will, is disqualified as a witness to prove the execution of the will or to prove the validity or invalidity thereof.

57. No unprivileged will or codicil, nor any part thereof, shall be revoked otherwise than by marriage or by another will or codicil, or by some writing declaring an intention to revoke the same, and executed in the manner in which an unprivileged will is hereinbefore required to be executed, or by the burning, tearing, or otherwise destroying the same by the testator or by some person in his presence and by his direction, with the intention of revoking the same.

58. No obliteration, interlineation, or other alteration made in any unprivileged will after the execution thereof, shall have any effect, except so far as the words or meaning of the will shall have been thereby rendered illegible or undiscernible, unless such alteration shall be executed in like manner as hereinbefore is required for the execution of the will; save that the will, as so altered, shall be deemed to be duly executed if the signature of the testator and the subscription of the witnesses be made in the margin or on some other part of the will opposite or near to such alteration, or at the foot or end of or opposite to a memorandum referring to such alteration, and written at the end or some other part of the will.

(x) Macnaughton's Principles of H. and M. Law, p. 211—12.

(y) See sec. 351 of Act X. of 1865 and sec. 2 cl. (d) of Act IV. of 1882.

(z) *Per* LORD JUSTICE TURNER in *Sonatum Bysack v. Mt. Juggut Soondery Dossee*, 8 M. L. A., 66.

(a) *Bhubun Moyce Debba v. Ram Kishore Acharjee*, S. P. C. J., 574. It has been very often said that the Hindus had no wills; but British administrators of Indian law are apt to forget that India had been under the Muhammadan rule for the last seven or eight centuries, and that the Muhammadan law of wills (*wasiatnama*) had been engrafted upon the common law of the country and in course of time became part and parcel thereof, so much so that the words *wasiat*, (will) and *wasī* (executor) are current words throughout Upper India. In Bengal the executor or administrator is called *ochhi*, a corruption of the Persian word *wasī*.

The leading case of *Tagore v. Tagore* established the following propositions of law :—

I. That in order to make a gift under a will good by Hindu law, the donee, except in the case of an adopted child, or a child *en ventre sa mère*, must be a person in existence capable of taking at the time when the gift takes effect. A child adopted after a man's death, in pursuance of a power given by him, is in contemplation of law begotten by that man. The law of wills among Hindus is analogous to the law of gifts ; and even if wills are not universally to be regarded in all respects as gifts to take effect upon death, they are generally to be so regarded as to the property which they can transfer, and the persons to whom it can be transferred. A person capable of taking under a will must be such a person as could take a gift *inter vivos*, and therefore must, either in fact or in contemplation of law, be in existence at the death of the testator.

II. That there is no reason why a Hindu should not, by will, create an estate for life. Where the testator left his property to A for life with remainders, showing that A should have no more than a life-estate, but that the testator wished to tie up the estate by provisions in tail, *held*, that A could not be declared entitled to more than a life estate.

III. That trusts are not unknown to Hindu law ; they can be created for carrying out such intentions as the law recognises.

IV. That a man cannot create a new form of estate, or alter the line of succession allowed by law, for the purpose of carrying ou this own wishes or views of policy. Where, therefore, a testator directed his property to go in a certain way on the failure or determination of estates created by him, it was held that such words contemplated the fact of those estates being legal and valid ; and that as they were illegal and invalid, no effect could be given to directions as to the further devolution of the property.

According to Hindu and Muhammadan law there is no rule against perpetuities. "In this country," said Sir Richard Garth

in *Kherode Money v. Durga Money*, "there is no rule against perpetuities, and we have no right to introduce one." (b) But the Transfer of Property Act extends this peculiar rule of English law to India, although it is provided that such extension shall not be deemed to affect any rule of Hindu, Muhammadan or Buddhist law.*

An unborn person cannot be the object of a gift. It is a cardinal principle of the Hindu law as to gifts that the donee must be in existence at the time the gift takes effect. There must be certainty both as to the subject and as to the object of the gift. There is no such thing in Hindu law according to the Gauriya school of Bengal as an estate opening to let in others of the same class. Property once vested cannot be divested. (c)

A bequest, therefore, by a Hindu to a class of persons some of whom are not in existence at the date of the testator's death is wholly void; and the fact that some of the class are then living and capable of taking, will not enable the class to open out and let in any after-born members of the class. (d)

An estate does not vest here in India in the sense in which the word is used in England. There is no distinction here between *legal* and *equitable* estates. The estate vests in the beneficiary. A Trustee holds property for the use and convenience of another. There is but one estate which always vests in the beneficiary. It has been frequently held that the mere appointment of a person as executor to a Hindu does not cause any property to vest in him at all, and that if as executor he is entitled to hold the property, he holds only as manager. The Hindu executor takes no estate, but only a power of management, and upon

(b) I. L. R., 4 Cal., 464.

(c) *Kally Prosonno Ghose v. Gokul Chunder Mitter*, I. L. R., 2 Cal., 205; *Soudamini Dossee v. Jogesh Chunder Dutt*, I. L. R., Cal., 262.

(d) *Kherode Money Dossee v. Durga Money Dossee*, I. L. R., 4 Cal., 455. See *Tagore v. Tagore*, 9 B. L. R. P. C., 377.

* The English rule against perpetuities was first legislated for India by the Indian Succession Act. It was then enacted into sec. XII. of the *Ordn. Estates' Act 1869*. By the *Hindu Wills Act 1870*, it was made applicable to the wills of Hindus, Jains and Sikhs residing or holding land in Bengal, Bombay and Madras.

the special purpose for which the executor is to hold the property failing, the property undisposed of vests at once in the heir who can sue for it. (e)

A purchaser from a Hindu executor is not bound to see to the exact amount of the debts which the testator has directed the executor to pay, or even to enquire if any such debts actually existed; he need not look further than the will itself. (f) "It would," said Mr. Justice Phear, "be inconvenient in practice if the purchaser was obliged to look further than the will itself; and if that will gave the executor or trustee the authority to pay debts out of the estate, I should be disposed to say the purchaser might safely rely on the executor's power to convey" (g)

It is now settled law that an attorney or executor under the will of a Hindu testator has not the same power over such testator's estate as an executor would have over leasehold estate according to English law; that according to Hindu law, a manager or an executor under a will has only a limited and qualified power over the immovable estate of the testator; that the general power of a manager under a will may be restricted by the will; that a manager under a will is bound to act according to the directions in the will; and that where an executor or manager under a will has power to sell or mortgage for specific purposes, it is the duty of the vendee or mortgagee to enquire into the circumstances under which, and the authority upon which, the sale or mortgage was effected. (h) Where, however, the executor finds it necessary for him to act *ultra vires* and to dispose of certain property against the wish or express direction of his testator, it is incumbent on him to obtain "the consent of the Court," whereby the probate of the will is granted, in order to confer a good title on the purchaser. The Probate and Administration Act, 1881 provides that an executor or adminis-

(e) *Per* MARKBY, J. in *Kherode Money Dossee v. Durga Money Dossee*, 1. L. R., 4 Cal., 468, 469. See *Ante* p. 66 note (w).

(f) *Roop Lall Khetry v. Mohima Charan Roy*, 10 B. L. R., 271 note.

(g) *Ibid.*, p. 274 note.

(h) *Sreemutty Dossee*, heiress of *Rajmohun Roy deceased*, v. *Tarrachund Ooondoo Chowdhry* Bourke's Rep., A. O. C., 48.

trator has power, with the consent of the Court by which the probate or letters of administration is granted, to dispose of the property of the deceased, either wholly or in part, *in such manner as he thinks fit*. Where, therefore the executor, in the exercise of his discretion, sells or mortgages the whole or any specified part of the immovable estate of the deceased *with the consent of the Court*, such sale or mortgage is valid, although it be in contravention of the directions in the will.

Under the Indian Succession Act, an executor or administrator has power to dispose of the property of the deceased, either wholly or in part, in such manner as he may think fit. Where the deceased being governed by the Act has made a specific devise of part of his immovable property, and the executor not having assented to the devise, sells the subject of it, the sale is valid. To validate such sales by an executor or administrator in the case of Hindus, Muhammadans and Buddhists the express consent of the Court by which the probate or letters of administration is granted, is now indispensably necessary. (i) But it seems that the consent of the Court is superfluous where there is an express direction "to sell and dispose of &c." in the will of the testator.

When there are several executors or administrators, the powers of all may, in the absence of any direction to the contrary in the will or grant of letters of administration, be exercised by any one of them who has proved the will or taken out administration. (j)

Upon the death of one or more of several executors or administrators, all the powers of the office become, in the absence of any direction to the contrary in the will or grant of letters of administration, vested in the survivors or survivor. (k)

The question how far lands purchased from a Hindu devisee are liable in the hands of the purchaser for the testator's debts, stands on the same footing as a similar question would under the present English law.

(i) Act V. of 1881 sec. 90. Cf. sec. 269, Act X. of 1865.

(j) Sec. 271, Act X. of 1865; also sec. 92, Act V. of 1881.

(k) Sec. 272, Act X. of 1865; also sec. 93, Act V. of 1881.

The creditors of the ancestor, or testator, may follow his lands into the possession of a purchaser from the heir or devisee, if it can be proved that such purchaser knew (1) that there were debts of the ancestor or testator left unsatisfied; and also (ii) that the heir or devisee to whom he paid his purchase-money intended to apply it otherwise than in the payment of such debts. But a purchaser ignorant on either of these points has a safe title, for no duty is cast upon the purchaser from the heir or devisee, to enquire whether there are any debts of the ancestor or testator, or to see to the application of his purchase-money, even when there is an express charge of debts by the testator on the devised estate; at least when the devisee is also executor, and in such a case, the burden of proof is entirely on the creditor to show that the purchaser from the devisee *had notice* that the latter intended to misapply the purchase-money. (1) For a purchaser to be affected with constructive notice through his solicitor, the latter himself must have actual notice. In India, as in England, lands may be followed by creditors in the hands of a purchaser from the heir or devisee, unless he is "a *bonâ fide* alienee without notice before action brought." The *onus probandi* as to such notice or knowledge in the purchaser of the debts and liabilities of the ancestor or testator is entirely on the creditors impeaching the validity of such alienation. "The burden of proof," observed Lord Cairns in *Corser v. Cartwright*, (m) "is entirely on the applicant, every probability of the case going to this, that as the mortgagee would not willingly lend his money upon a security that would be defective, so his solicitor having no object or interest in the matter leading him to a different line of conduct, would not allow his client to advance money upon a bad security and thereby make himself liable to an action by his client for negligence." The general rule as to liability of lands purchased from a Hindu heir or devisee for

(1) *Per* PONTIFEX, J. in *Greender Chunder Ghose v. Markintosh*, I. L. R., 4 Cal., 897; *Gunga N Paul v. Umesh C Bose*, W. R., 1864, 277.
 (m) L. R., 7 Eng. & Ir. App., 731.

debts of the ancestor or testator is thus laid down by Mr. Justice Pontifex in his learned judgment on *Ghose v. Mackintosh* :—"When a purchaser or mortgagee has actual notice or constructive notice through his solicitor, that the ancestor or testator of his vendor or mortgagor left debts still remaining undischarged, and that the vendor or mortgagor left those debts still remaining undischarged, and that the vendor or mortgagor improperly intends applying the purchase or mortgage monies to his own purpose, notwithstanding the existence of such debts, a conveyance or mortgage under such circumstances would be fraudulent, and the purchaser or mortgagee taking under it would be liable to be treated as an actor in the fraud, and the property comprised in it would continue in his hands subject to the liabilities to which the purchaser or mortgagee had notice it was liable in the hands of the heir, executor or devisee."

Where *devastavit* is committed by the heir or devisee by a sale or mortgage of the ancestor's or testator's property, the creditors of such ancestor or testator if they wish to impeach the sale or mortgage should file their suit for the purpose of following the property in the hands of the purchaser or mortgagee within *six* years from the date of such *devastavit* (u)

If the creditors have been kept from the knowledge of their rights by means of any fraud or concealment to which the purchaser from the heir or devisee was party or privy, such fraud and concealment must be expressly alleged and proved.

In *S. M. Soorjee Money Dossee v. Denobundoo Mullick* (v) the Judicial Committee of the Privy Council thus laid the rules as to construction of wills in India :—"In determining the construction of a will, what we must look to, is the *intention* of the testator. The Hindu law, no less than the English law, points to the intention as the element by which we are to be guided in determining the effect of a testamentary disposition ; nor, so far as we are aware, is there any difference between the one law and the other as to the materials from which the intention is to

(u) *Per WARRIS, J.* in *Ghose v. Makintosh*, 1 L. R., 4 Cal., 920.

(v) 6 M. L. A. 549—52 ; Pandit's P. C. J., Vol. 1, 584—85.

be collected. Primarily the words of the will are to be considered. They convey the expression of the testator's wishes ; but the meaning to be attached to them may be effected by surrounding circumstances, and where this is the case these circumstances no doubt must be regarded. Amongst the circumstances thus to be regarded, is the law of the country under which the will is made and its dispositions are to be carried out. If that law has attached to particular words a particular meaning, or to a particular disposition a particular effect, it must be assumed that the testator, in the disposition which he has made, had regard to that meaning and to that effect, unless the language of the will or the surrounding circumstances displace that assumption.

" The will of a testator must, *prima facie* at least be taken to refer to that which is the subject of his disposition ; the property which he has himself to give ; and if he has evinced his intention to give that property, very *strong* and *clear* language must be required to countervail that intention, and subject the property which has once been given to his further disposition." The Privy Council further added that in construing a will, a Court of Justice " must found its conclusions upon just reasoning, and *not* upon mere speculative doubts."

The law of the Mitāksharā differs from the law of Bengal Devises by Hindu in some respects, and, amongst others, with respect to wills. But even under the Mitāksharā how far valid. it is settled that a will of property, not ancestral, may be good. If then the will did not affect ancestral estate it must be, not because an owner of property by the Mitāksharā law can not make a will, but because by some peculiarity of ancestral property, it is withdrawn from the testamentary power. (p)

" *Tamlīk*," or assignment of ownership, is a term of general import applying to the various modes of acquisition of property recognised by Muhammadan law, but forms no separate and distinct mode of acquiring

Muhammadan Law "Tamlīk" Gift-will

property. When applied to gift it does not avoid the legal requirements of acceptance and seisin.

An instrument called a '*tamlík-nama*' purported to give S, in consideration of her devotion and affection to the executant, the executant's property ; and provided that the executant should during her life enjoy the income from the property, that at her death S should have the proprietary possession and enjoyment of the property, just like the executant, that the executant should effect mutation of names in respect of the property in S's favour, that the property should not belong to any other person but S, and that any transfer by the executant to any other person should be void. After giving S the power to transfer the property by sale, mortgage, gift, '*tamlík*,' &c., it proceeded in manner following :—“ But S, or her transferee, shall get possession of the said share only after my death. On my death S and her heirs shall become the owner of this share.” It was held by the Allahabad High Court that the deed could only have validity as a will ; as a deed of gift it was wholly invalid. (g)

(c)—DEED OR PURCHASE.

The power of alienation is a necessary incident of ownership. Every person, except infants, idiots and persons of unsound mind, who is seised of or entitled to any estate or interest in land, may alien the same by gift, sale or otherwise according to the rules prescribed by the territorial and the personal law to which he is subject. “There are,” said Mr. Justice Willes in *Tagore v. Tagore*, “general principles affecting the transfer of property which must prevail wherever law exists, and to which resort must be had in deciding several questions of an elementary character and as to which there is no precise authority. The power of parting with property once acquired, so as to confer the same property upon another, must take effect either by inheritance or transfer, each according to law. ~~Inheritance~~ does not depend upon the will of the individual

(g) *Salad Kasum v. Shaukat Bibi*, 7 N. W. P. H. C. R., 313.

owner : transfer does. Inheritance is a rule laid down (or, in the case of custom recognized) by the State, not merely for the benefit of individuals, but for reasons of public policy—Damat, 2413. It follows directly from this that a private individual, who attempts by gift or will to make property inheritable otherwise than the law directs, is assuming to legislate, and that the gift must fail, and the inheritance take place as the law directs. This was well expressed by Lord Justice Turner in *Soorjeemoney Dossee v. Denobundoo Mullick* (v) :—‘A man cannot create a new form of estate, or alter the line of succession allowed by law, for the purpose of carrying out his own wishes or views of policy.’ Another general principle applicable to transfers by gift (more liberally applied in the law of England to wills than to gifts *inter vivos*) is that a benignant construction is to be used; and that if the real meaning of the document can be reasonably ascertained from the language used, though that language be ungrammatical or untechnical, or mistaken as to name or description, or in any other manner incorrect, provided it sufficiently indicate what was meant, that meaning shall be enforced to the extent and in the form which the law allows. Accordingly, if the gift confers an estate upon a man with words imperfectly describing the kind of inheritance, but showing that it was intended that he should have an estate of inheritance, the language would be read as conferring an estate inheritable as the law directs. If an estate were given to a man simply without express words of inheritance, it would, in the absence of a conflicting context, carry by Hindu law (as under the present state of law it does by will in England) an estate of inheritance. If there were added to such a gift an imperfect description of it as a gift of inheritance, not excluding the inheritance imposed by the law, an estate of inheritance would pass. If, again, the gift were in terms of an estate inheritable according to law, with superadded words restricting the power of transfer which the law annexes

(v) 6 M. L. A., 526 ; Pandit's P. C. J., Vol. I., 583.

to that estate, the restriction would be rejected, as being *repugnant*, or, rather, as being an attempt to take away the power of transfer which the law attaches to the estate which the giver has sufficiently shown his intention to create, though he adds a qualification which the law does not recognize. If, on the other hand, the gift were to a man and his heirs, to be selected from a line other than that specified by law, expressly excluding the legal course of inheritance, as, for instance, if an estate were granted to a man and his eldest nephew, and the eldest nephew of such eldest nephew, and so forth for ever, to take as his heirs, to the exclusion of all other heirs, and without any of the persons so taking having the power to dispose of the estate during his lifetime,—here, inasmuch as an inheritance so described is not legal, such a gift cannot take effect, except in favor of such persons as could take under a gift to the extent to which the gift is *consistent* with the law. The first taker would, in this case, take for his lifetime, because the giver had at least that intention. He could not take more, because the language is inconsistent with his having any different inheritance from that which the gift attempts to confer, and that estate of inheritance which it confers is void. (s)

“The law of gifts during life is of the simplest character.

Hindu law of gifts. As to ancestral estate, it is said to be improper, (and under the Mitākshārāh school illegal,) that it should be aliened by the holder without the concurrence of those who are interested in the succession; but by the law as prevailing in Bengal at least, the impropriety of the alienation does not affect the legal character of the act (*factum valet*), and it has long been recognized as law in Bengal that the legal power of transfer is the same as to all property, whether ancestral or acquired. It applies to all persons in existence, and capable of taking from the donor, at the time when the gift is to take effect, so as to fall within the principle

(s) *Tugore v. Tugore*, 9 B. L. R. (P. C.), 394—96; See also *Bramamayi Dossee v. Jogesh Chandra Dutt*, B. L. R., 410; *Shaw v. Shaw*, 1 Cal., 104; *Kaly Nath Naug Chowdhery v. Chunder Nath Naug Chowdhery*, 1. L. R., 8 Cal., 378; *Pramoth Dossee v. Radhika Prosad Dutt*, 14 B. L. R., 175.

expressed in the *Dâyabhâga*, ch. I., v. 21, by the phrase 'relinquishment in favor of the donee who is a sentient person.' By a rule now generally adopted in jurisprudence, this class would include children in embryo, who afterwards come into separate existence. As to the case of adopted children (so much relied upon during the argument), it is distinguishable because of the peculiar law applicable to that relation. The Hindu law recognizes an adopted child, whether adopted by the father himself in his lifetime, or by the person to whom he has given the power of adoption after his death, from amongst those of his class, of one to stand in the place of a child actually begotten by the father. In contemplation of law, such child is begotten by the father who adopts him, or for and on behalf of whom he is adopted. Such child may be provided for as a person whom the law recognizes as in existence at the death of the testator, or to whom, by way of exception, not by way of rule, it gives the capacity of inheriting, or otherwise taking from the testator, as if he had existed at the time of the testator's death having been actually begotten by him. Apart from this exceptional case, which serves to prove the rule, the law is plain that the donee must be a person in existence capable of taking at the time when the gift takes effect."

According to Hindu law a married woman has absolute Alienation of dominion over her *stridhan* or her separate and immovable property purchased with *stridhan*. peculiar property, except land given to her by her husband. Immovable property purchased by her with her *stridhan* can also be disposed of by her as she pleases. (i)

Immovable property purchased by a Hindu wife out of her *stridhan*, becomes her *stridhan*, and her husband cannot cut down her absolute estate therein, to a life-estate, by any *dowl* or deed of settlement which he may make. (u)

Husband cannot cut down wife's estate in *stridhan* to a life estate.

(i) *Lachman C. Gaur Gossain v. Kali Churn Singh*, 19 W. R., (P. C.) 292.

(u) *Mohima Chunder Roy v. Durga Money*, 23 W. R., (P. C.) 184.

The word "*angoja santan*" occurring in a deed of gift would limit the gift to the male issue of the donee. (v)

The meaning of *putra santan*, 'male issue,' is not confined to sons alone. As that expression is generally understood, it includes grandsons, and it would be repugnant to the feelings of a Hindu ancestor that grandsons should be excluded. (w)

Under the Muhammadan law, gifts are rendered valid by tender or relinquishment of the thing granted on the part of the donor, and by acceptance and seisin on the part of the donee; and a verbal gift is as effectual as that made in writing. A gift cannot be made to depend on a contingency, nor can it be referred to take effect at any future definite period. The subject of gift must be actually in existence at the time of the donation. A gift is null and void where the donor continues to exercise any act of ownership over the property granted, except in the case of a house given to a husband by a wife and of any property given by a parent to his or her minor child. Formal delivery and seisin are not necessary in the case of a gift to a trustee having the custody of the thing given, nor in the case of a gift to a minor. The seisin of the guardian in the latter case is sufficient. A gift on a deathbed is viewed in the light of a legacy, and cannot take effect for more than a *third* of the property; consequently no person can make a gift of any part of his property on his deathbed to one of his heirs, it not being lawful for one heir to take a legacy without the consent of the rest. A donor is at liberty to resume his gift, except in the following instances: A gift cannot be resumed where the donee is a relation; nor where anything has been received in return; nor where it has received any accession*; nor where it has come into the possession of a second donee, or into that of the heirs of the first. (x)

(v) *Bugola Moyee v. Bhowanee Churun Paul*, 5 W. R., 119.

(w) *Per* NORMAN, C. J. in *S. M. Bramamayi Dossee v. Jages Ohandra Dutt*, 8 B. L. R., 408.

(x) MAEN, M. L., Chap. V.

* The gift of a piece of land can not be retracted after the donee has planted trees thereon or built a house, a stable, or a shop of such a size as to be deemed an increase. *Hidayah*, Vol. III. p. 302.

A grant for the life of the donee (*umrâ* or *hayâtî*) on condition of reverter to the donor upon the donee's death, is valid under Muhammadan law, but the condition is void and the property descends to the donee's heirs. (y)

The Muhammadan law enumerates two contracts under the head of gifts, which, however, more nearly resemble exchange or sale. They are technically termed *Hibâ-bil-Iwaz*, mutual gift, or gift for an exchange, and *Hibâ-ba-shart-ul-Iwaz*, gift on stipulation, or on condition of an exchange.

Hibâ-bil-Iwaz is said to resemble a sale in all its properties; the same conditions attach to it, and the mutual seisin of the donees is not, in all cases, necessary.

Hibâ-ba-shart-ul-Iwaz, on the other hand, is said to resemble a sale in the first stage only; that is, before the consideration for which the gift is made has been received, and the seisin of the donor and donee is therefore a requisite condition. Property is not established in the subject of gift before possession; and each party may refuse delivery. But after mutual possession has been taken, the effect is that of sale, and there can be no revocation.

A *hibânâmah* made in good faith cannot be defeated by a subsequent judgment-creditor. (z)

A Muhammadan husband executes a 'hibâ' or deed of gift, without consideration in favour of his wife, comprising a house in which they are residing at the time, with its furniture and two other houses. He at the same time delivers the hibâ and the key of the houses to his wife, quits the house of residence, leaving her in possession of the same. Held, that the requirements of the Muhammadan law, with regard to gifts without consideration, viz., acceptance and seisin on the part of the donee, and relinquishment on the part of the donor, have been complied with, though the husband shortly afterwards returns to the house, resides there with his wife till his death, and receives the rents of other parts of the property comprised in the hibâ. The continued occupation or residence and receipt

(y) *Hidāyah*, Vol. III, p. 309. See *Nabob Amiruddaula Muhammad v. Nateri Srinivasa Charlu*, 6 Mad H. C. R., 356; *Agnew's L. of Trusts*, 41.

(z) *Soodhakeena Chowdhraim v. Gopee Mohun Sein*, 1 W. R., 41.

of rents are in such circumstances to be referred to the character which the donor bears of husband and to the rights and duties connected with that character. (a)

It is essential to the validity of every contract of sale, that the subject of it, and the consideration should be so determinate as to admit of no future contention regarding the meaning of the contracting parties. It is also essential that the subject of the contract should be in actual existence at the time of making the contract, or that it should be susceptible of delivery, either immediately or at some future definite period. A warranty as to freedom from defect and blemish, is implied in every contract of sale.*

"A remarkable peculiarity," says Mr. Baillie, "of the Muhammadan law of sale, is, the doctrine of option, or right of cancellation. The Prophet himself recommended one of his followers to reserve a *locus penitentie*, or option for three days in all his purchases. This has led to the option by stipulation. The greatest of all defects is a want of title or right in the seller, and the purchaser's right of cancellation on that account is treated of at length in the *Hidāyah* and other treatises." (b)

Where an option of dissolving a contract for sale has been stipulated by the purchaser, and the property sold is injured or destroyed in his possession, he is responsible for the *price* agreed upon : but where the stipulation was on the part of the seller, the purchaser is responsible for the *value* only of the property. But the condition of option is annulled by the purchaser's exercising any act of ownership, such as takes the property out of its *statu quo*. If a person should sell by an invalid contract a piece of

land which the purchaser converts into a *musjid*, the right of cancellation is not extinguished until the erection of the building ; but if a building be erected the right to cancel is annulled

(a) *Ameena Beebee v. Kharija Beebee*, 1 Bom. H. C. Rep., 157.

(b) Baillie's Muhammadan Law of Sale, Introduction 48.

* Under the Transfer of Property Act, sec. 55, para 2, the warranty extends only to "the interest which the seller professes to transfer to the buyer."

according to Abou Haneefa ; and the planting of trees upon land would have the same effect as erecting buildings (c)

There is a peculiar kind of sale termed the '*bayi-mukasah*', *Bay mukasah*, which properly is barter : a sale in one shape and purchase in another shape. (d) In this country, however, the term '*bayi-mukasah*' is generally understood to mean 'a sale in liquidation, in which the consideration due by the seller to the purchaser is set off against the thing sold.'

The consideration of *bayi-mukasah* as well as the subject of consideration. such sale is required to be specific and determinate so as to prevent any future dispute between the parties.

The consideration above alluded to is generally a portion of the whole of the *daen-muhar* or unpaid dower of the seller's wife. Here recourse is generally had to *bayi-mukasah* as well as to *hibat-bil-Tauz* (a gift for an exchange).

A Mussulman disposes of *all* his property to his wife by a deed of *bayi-mukasah*. According to law the estates, whether one, two, or more, that were specified in the deed of *bayi-mukasah* will pass, and be conveyed in virtue of the deed, notwithstanding that the person who executed *that* deed may have farmed them out for a term of six years before the execution of the deed ; and according to the above contract, the purchaser (that is the wife) will be proprietor of the estates. As in a contract of *bayi-mukasah* the law does *not* require seisin and possession, the deed of *bayi-mukasah* will be legally valid, although the purchaser may be out of possession for several years. (e)

A husband sold to his wife, in exchange for the sum of fifteen thousand rupees of her claim of dower, all the lands and houses specified in the deeds, his household property, every thing that he acquired by inheritance, together with all the property that he might be possessed of up to the day of sale. Now the conditions of this contract are invalid, and it is null

(c) Baillie's Muhammadan Law of Sale, 216.

[pp 507—8.

(d) *Vide* Hidayah, Vol. III., page 31. Tagore Law Lectures, 1873.

(e) Macn. Prin. M. L., Chap. II., case 10 ; *Nusseebounnissa v. Syed Danush Ali*, 3 W. R., 123.

and void, because the property sold is not specified, and uncertainty legally vitiates a contract of sale. The heirs of the seller are therefore at liberty to set aside the contract. (f)

If one man grants a tenure to another for the purpose of living upon the land, that tenure, in the absence of evidence to the contrary, is assignable. (g)

Title by Pottah of *bastu* or *purjote* lands assignable by custom. B and C and their father held lands for upwards of thirty-five years, and built houses on the same. B and C sold their tenures to D and E. A the Zamindar, who had not objected to the building, now sued to eject D and E as trespassers. Evidence was given that the tenures, were by the custom of the country, transferable. *Held* by a Full Bench (consisting of Peacock, C. J., Jackson and Macpherson J. J.,) that A could not eject D and E.

Altumgah, aymâ, mududmash and other grants which are hereditary, "*naslan-bad-naslan*," are declared transferable by gift, sale, or otherwise, under the terms of sec. 15, Bengal Regulation XXXVII of 1793.

A voluntary transfer of property by way of gift, if made *bonâ fide*, and not with the intention of defrauding creditors, is valid as against creditors. The Voluntary conveyance made *bonâ fide*, valid against creditors. Hindu and English laws on the subject were discussed in a Madras case, the Court in delivering judgment observed :—"According to the Hindu law, the possessor of property, whether movable or immovable, may make as effectual a transfer of his right and interest by a gift as by a sale or other disposition. It makes no distinction that we know of in favour of creditors between a voluntary transfer and one for a valuable consideration. In truth the Hindu law does not, we believe, contain any special prohibitory provisions relating to the protection of creditors generally. The principle of fraud in accordance with the general Hindu law is, in our judgment, the proper principle applicable to the present case and all cases of a similar

(f) MAON. PRINC., M. L., Chap. II., case 9.

(g) *Per* SIR BARNES PEACOCK, C. J., in *Beni Madhub Banerjee v. Jailerishna Mukerjee*, 7 B. L. R., 152; 12 W. R., 496.

nature. In the case of a transfer for valuable consideration, creditors who can only look to the property as available in execution cannot object to the transfer as fraudulent, if it has been made and accepted *bonâ fide*, that is, with the honest intention of passing the property, if the transaction has been *real* and not a fictitious contrivance to deceive as to the right of property. (*h*)

(D)—POSSESSION.

Possession is either *permissive* or *adverse*. Possession by the *karta* or manager of a Hindu joint family is a permissive and a fiduciary one.

Title by possession is regulated by the Statute of Limitations. Receipt of rent or profits by a trespasser or wrongful claimant is patent evidence of adverse possession.

Where occupation was originally permissive, its conversion into an occupation of a wholly adverse nature is not to be presumed in the absence of evidence to establish this change.

To make out a complete legal bar, the occupation should be proved to be adverse during the whole of the twelve years before suit, and it should be ascertained with what persons the actual possession has been during that time. (*i*)

Where widow's possession was *primâ facie* not adverse, such possession, until otherwise shown, will be presumed to have continued a possession of that character. (*j*)

The question as to what constituted "an adverse possession" within the meaning of the Indian Limitation Acts was amply discussed in the case of *Umr-un-nissa v. Muhammad Yur Khan* (*k*). Mr. Justice Oldfield in his two learned judgments in the case made the following observations :—

"Lord St. Leonards, in his Handy-book on Property Law, 7th Ed., page 214, says :—'The term discontinuance of possession

(*h*) *Gnanabhai v. C. Srinivasa Pillai*, 4 Mad. H. C., Rep., 84; See also 10 Bom. H. C. R., 206; 2 W. R., 271.

(*i*) *Wahseoddeen v. Shungoree and others*, H. C. R., 2 N. W. P., 16.

(*j*) *Anumur Singh v. Murdun Singh*, H. C. R., 2 N. W. P., 31.

(*k*) I. L. R. 3 All. 30-31 & 36.

means abandonment of possession by one person, *followed by the actual possession of another person*, otherwise there would be no person in whose favour time would run.' It would thus seem that there must be actual possession on the part of the person setting up an adverse title by possession. Turning to the Roman law to ascertain what was understood by possession, we find in Sandars' Institutes of Justinian, page 51 (Introduction, c. 67) : 'To the notion of *dominium* was opposed that of *possessio*. A person might be owner of a thing and yet not possess it, or possess it without being the owner. Possession implied actual physical occupation, or *detention*, to use the technical term, of the thing ; but it also implied something more in the sense in which it was used by the Roman lawyers. It implied not only a fact, but an intention ; not only the fact of the thing being under the control of the possessor, but also the intention on the part of the possessor to hold it so as to reap exactly the same benefit from it as the real owner would, and to exercise the same rights over it, even though he might be well aware that he was not the real owner, and had no claim to be so. The possessor had no rights over the thing ; but he was entitled to have his possession protected against every one but the true owner, and length of possession would, under certain conditions fixed by law, make the possessor really become the owner of the thing possessed.' And at page 174 : 'A person may not be the owner of a thing, and yet may be in a position to exercise all the rights of an owner over it, and may exercise it, with the intention to do so, as if he were the owner. He is then in Roman law called the *possessor* (see introd. sec. 67), as opposed to a *dominus* or real owner.' And at page 420 of the Institutes, it is stated that the contract of *pignus* gave the possession of the thing pledged to the creditor, but left the property in the thing with the debtor : the *hypotheca* left both the property and the possession with the debtor.

"I find it stated in Brown's Law Dictionary, page 16 : 'The possession of a mortgagee is adverse to the title of the mortgagor,' and the author observes that precisely because it is such,

it will mature by length of duration and non-acknowledgment into an absolute and independent legal right, and, no doubt, there is considerable force in this argument; and in *Cholmondely v. Clinton*, 2 Jac. and Walk., cited in Story's Equity Jurisprudence, 11th Ed., Vol. 2, page 229, it is remarked: 'The mortgagee when he takes possession, is not acting as a trustee for the mortgagor, but independently and adversely for his own use and benefit.'

"A person setting up adverse possession within the meaning of the Limitation Act must I apprehend show that he has exercised what is technically termed *detention* of the property for himself as owner to the exclusion of the person claiming against him, or that such *detention* if exercised by another was exercised for him, and the term *detention* has been defined to be 'the condition, in which not only one's own dealing with the thing is physically possible, but every other person's dealing with it is capable of being excluded.' Savigny on Possession, translated by Sir Erskine Perry, 6th Ed., page 2."

Possession is more decisive than documentary and oral evidence. (l) Nevertheless it must be supported by a title *prima facie* effectual. The title too must have been acquired under circumstances indicative of good faith; a fraudulent purchase is regarded as a theft, (m) for fraud vitiates every transaction. Where a person is in possession through *three* descents, the law presumes that a title exists, and even an originally unlawful possession acquires legality. (n)

Possession has been deemed by the Hindu and the Muhammadan law as interpreted in the Presidency of Bombay to amount to notice of such title as the person in possession may have; and any other person who takes a mortgage or other charge upon immovable property without ascertaining the nature of the claim of him who is in possession, does so at his own risk. This is the rule in England also. The rule, however,

(l) Dr. Jolly's Institutes of Narada, p. 23.

(m) Manu VIII., v. 165.

(n) Dr. Jolly's Narada, p. 25; See also Raghunandan, Chap. VII, [sec. 1 & 5.]

that registration is equivalent to possession, cannot be applied where the registration of the instrument earlier in date has been effected subsequently to the execution of the instrument set up against it. (o)

Possession alone cannot be conclusive evidence of title, nor does it constitute title; but long and undisturbed possession on the part of the vendor, when positive evidence of title cannot be had, may in many cases be sufficient to constitute proof of title. (p) Adverse possession for more than 12 years is of itself sufficient to create a title. (q) But mere proof of possession for more than twelve years does not amount to proof of a mokurari title. (r) The possession may be merely permissive or under a defective title or for a term of years.

A person in possession of property ought to be presumed to be in lawful possession until the contrary be shown. Beyond this possession is only evidence to be taken conjointly with other evidence to establish or impugn a title. (s)

Adverse possession for more than twelve years not only bars remedy, but extinguishes right and confers title on the party holding such adverse possession. (t) In the case of *Gunga Gobind Mundul v. The Collector of the 24-Pergunnahs*, the Judicial Committee of the Privy Council observed :—"It is of the utmost consequence in India that the security which long possession affords should not be weakened. Disputes are constantly arising about boundaries and about the identity of lands,—contiguous owners are apt to charge one another with encroachments. If twelve years' peaceable and uninterrupted possession of lands, alleged to have been enjoyed by encroachment on adjoining lands, can be proved, a purchaser may take that title in safety; but, if the party out of possession could

(o) *Lakshmandas Sarup chand v. Damat*, I. L. R., 6 Bomb 168—9.

(p) *Per* MAREBY, J, in *J Mukerjee v R. Mukerjee*, 12 W. R., 315.

(q) *Per* DWARKANATH MITTER, J., in *Ram Sahoy Singh v. Kooldeep Sing*, 15 W. R., 80.

(r) *Shiv Doyal Pure v. Thakur Mahabir Prasad*, 2 B. L. R., Ap. 8.

(s) *Setam Sheikh v. Baidonath Ghattak*, 3 B. L. R. A. C., 312.

(t) *Raja Baradakant Roy v. Frankissen Paroi*, 3 B. L. R., 343; See also I. L. R., 1 Bom., 238, 597.

set up a sixty years' law of limitation, merely by making common cause with a Collector, who could enjoy security against interruption? The true answer to such a contrivance is, the legal right of the Government is to its rent; the lands are owned by others: as between private owners contesting *inter se* the title to the lands, the law has established a limitation of twelve years: after that time, it declares not simply that the remedy is barred, but that *the title is extinct in favour of the possessor*. The Government has no title to intervene in such contests, as its title to its rent in the nature of *jumma* is unaffected by transfer simply of proprietary right in the lands. The liability of the lands to *jumma* is not affected by a transfer of proprietary right, whether such transfer is effected simply by transfer of title, or less directly by adverse occupation and the law of limitation." (u)

Continuous possession of land by a wrong-doer for twelve years not only extinguishes the title of the rightful owner of such land, but confers a good title on the wrong-doer. (v) Where a plaintiff seeks to recover possession of property of which he has been dispossessed, and bases his claim on the ground of purchase, and also upon the ground of a twelve years' possessory title, he is entitled to succeed if he proves his possession, even if he fails to prove his purchase. (w) The Calcutta High Court has gone further and held that the title of a mere trespasser upon land can be transferred to a third person whilst it is in course of acquisition, and before it has been perfected by a twelve years' possession. In *Brindabun Chunder Roy v. Tara Chand Bandopadhyaya*, (x) the defendant purchased in 1856 from the Official Assignee certain property belonging to one D. In 1867, he brought a suit against the heirs of D for possession of the property purchased; he obtained a decree in May 1869, under

(u) *Gunga Gobind Mundul v. The Collector of Twentyfour-Parganahs*, 11 M. I. A., 345. Pandit's P. C. J., Vol. II., 286.

(v) I. L. R. 3 All., 435; I. L. R. 3 Cal., 224; 8 B. L. R., 540; 20 W. R., 104; I. L. R., 6 Bom., 222—3.

(w) *Gossain das Chunder v. Issur Chunder Nath*. I. L. R. 3 Cal., 224.

(x) 11 B. L. R., 237—244.

which he obtained possession in May 1870. In June 1870, the plaintiff filed a petition under sec. 230 Act VIII. of 1859 alleging that he had purchased the property claimed from the heirs of D in 1864, and had been in possession until he was ousted by the defendant, and that he was not a party to the suit brought by the defendant in 1867. *Held* that the title of the defendant was barred, more than twelve years having elapsed from the date of his purchase and that the plaintiff was entitled on mere proof of *bona fide* possession and that he was not a party to the suit by the defendant in 1867 to put the defendant to proof of his own title, and on the defendant's failing to prove his title, to be restored to possession. Mr. Justice Markby in delivering his judgment in this case thus commented upon the dicta of the Judicial Committee in the leading case of *Gunga Gobind Munda v. The Collector of 24-Pergunnahs*: "The Privy Council say, not only that the title of the party whose right is barred by the statute of limitation is extinguished but that it is *extinguished in favour of the possessor*. When the twelve years expired in this case, the plaintiff was in possession, and was he 'the possessor' within the meaning of this rule? I think it cannot be disputed that by 'the possessor' is here meant not only the person in original possession, but any person who comes in under him during the twelve years by inheritance, will or conveyance. But if this be so, I do not see how the plaintiff can be excluded. I understand the principle of law to be that *a person in possession without title has an interest in the property good as against all the world except the true owner*, which interest is capable of being dealt with, until the true owner interferes, just in the same way as if it were unimpeachable, and that it, therefore, passes by conveyance or devise. Why then should it not pass by an execution-sale? the plaintiff, as purchaser at an execution-sale, received a certificate, which is by law (sec. 259 of the Civil Procedure Code, Act VIII of 1859) 'a valid transfer of the right, title, and interest of the judgment-debtors in the property sold.' D was the judgment-debtor and died in possession. His interest in the property, though without title, was of such a

nature as would pass by inheritance to his sons. (z) It did so pass; and afterwards passed by the execution-proceedings from his sons to the plaintiff just as completely as by a private sale. As against all the world except the defendant that execution-sale passed to the plaintiff an unimpeachable title, and as soon as the defendant's suit was barred, the plaintiff's title was complete. The conclusion that the plaintiff's title is necessarily established if the defendant's title is barred, seems to me warranted by good sense as well as by law. It seems to me to be almost an absurdity that there should be any case of land without an owner when there is a person in possession of it who cannot lawfully be disturbed." Mr. Justice Birch added: "No distinction can be made between a person claiming under an execution-sale as contradistinguished from a person claiming under an ordinary conveyance or assignment. (a) There is no provision in the Indian Limitation Act XIV of 1859, analogous to that of sec. 34, 3 & 4 William IV., c. 27, which declares that the right and title of the party out of possession is extinguished at the end of the period of limitation prescribed by the statute. But it has been held by the Privy Council in *Gunga Gobind Mundul v. The Collector of the 24-Pergunnahs*, (b) and by this Court in several rulings following on that judgment, that, if a person suffers his right to sue for title to be barred by limitation, the effect of his laches is the extinction of his title in favour of the person in possession. And I apprehend it to be now well established that, when his remedy is barred, the right and title of a claimant is extinguished and transferred to the person in possession. The dispossession of the plaintiff by the Nazir was in reality wrongful as he was no party to the suit, and had the Court ordering execution known how the matter stood, no order for dispossession could have been given under sec. 223, and it would be inequitable to hold that the plaintiff is to be damaged by a wrongful dispossession, and that he is to be

(z) *Doe d. Oarter v. Barnard*, 13 Q. B., 945.

[M. I. A., 366.

(a) *Raja Enayet Hossein v. Girdhari Lal*, 2 B. L. R., P. C., 75; 12

(b) 11 M. I. A., 345. See *ante*, p. 88.

put to proof of his title when, had his possession been undisturbed, it was good against all the world."

Possession, therefore, is a good title against every one who cannot prove a better. (c) A person in possession with a bad title, is entitled to remain in possession until another person can disclose a better title. (d) Long and undisturbed user or possession confers title by prescription, because it is presumed to be founded on title. (e) Following a decision of the Privy Council, it was held that possession of land without payment of rent for twelve years is sufficient to establish *lukhirāj* title. (f) As a general principle of law, the fact of obtaining possession affects the title, and has in all systems of law, European and Oriental, been always treated as a most important element in the acquisition of title. (g)

The rights of co-sharer in a joint estate were sold by auction; but it did not appear that a site held by him in the village passed by the sale, and the site remained in the possession of his heirs, who sold it to the defendant, who erected a shop thereon. Twenty years after the auction-sale, the plaintiff's who were co-sharers in the joint estate, sued for the demolition of the house and the restoration of the site to the village. *Held* that, under the circumstances, their claim could not be maintained. (h)

The general period of limitation, twelve years, is inapplicable where the possession and title of the defendants as auction purchasers at a sale for arrears of Government revenue, are alleged in the plaint to be founded on fraud. (i)

The possession of a purchaser at a sale in execution of decree, without notice of a mortgage of the property, is adverse to the mortgagee, for it was the possession of a person believing

(c) *Olarhe v. Brindabun Ohunder Sirkar and others*, Marsh., 75.

(d) *Gopee Nath Das v. Dyanidhi Sundora Mohapatra*, 7 W. R., 485.

(e) *Gooro Persaud Roy v. Bykunto Ohunder Roy*, 6 W. R., 82.

(f) *Bisso Nath Komilla v. Brajo Mohun Ohuckerbutty*, 10 W. R., 61.

(g) *Salim Shaik v. Baidonath Ghuttuck*, 12 W. R., 217; B. L. R. A. C.,

(h) *Bahadoor v. Shodee Ram*, 2 Agra Rep. A. C., 3. [312.]

(i) *Nawab Stahse Nusser Ali Khan v. Rajah Ojoodhya Ram Khan*, 10 M. L. A., 540.

himself to be *bonâ fide* owner and claiming as absolute owner ; and a suit to disturb his possession must be brought within twelve years of the commencement of such possession. (j)

Where a party *bonâ fide* purchased from another, as his own property, land in fact mortgaged, and obtained possession and mutation of names in the Collector's books, his title was held to be adverse to that of the mortgagee. After such *bonâ fide* purchaser had been in open possession more than twelve years, and after the lapse of more than twelve years from the accrual to the mortgagee of the right of entry under the mortgage-deed (which was in the English form), the mortgagor sued the purchaser to obtain possession of the property. It was held by the Privy Council that the suit was barred. (k)

A title by prescription may be acquired by long possession, but it must be a possession not merely *permissive*, but *as of right*, e. g., in the capacity of a master, or in the case of easements, adversely to the owner of the land. (l)

The possession on the part of one party which is *not* shown to have commenced in wrong, can only be disturbed by distinct proof of a *superior* title in another. (m)

Presumption from Possession—Maurasi-Title. Continuous payment of rent for about a hundred years was held to give rise to a presumption that the tenants held under a maurasi title. (n)

A, originally owned two zemindaries between which lay a *Bheel* or marsh, of which he also owned the fisheries. One of the zemindaries was sold and purchased by B, but the *bheel* fisheries still continued with the remaining zemindari held by A. After the sale, certain lands reclaimed from the *bheel* were, for some years held by B as part of his purchased zemindari. A instituted a summary suit under Act IV of 1840, and was by an order of the Magistrate put in possession of these lands.

(j) *Srimati Anand Moyi Dossee v. Dharandra Chunder Mukerjee*, 8 B. L. R., (P. C.) 122. Pandits' P. C. J., Vol. II., 698.

(k) *Brojanath Koondoo Chowdhery v. Khebut Chandra Ghose*, 8 B. L. R., (P. C.) 104. Pandit's P. C. J. Vol. II., 711. [281.]

(l) *Askar v. Ram Manick Roy*, 13 W. R., 344. Also 3 B. L. R. A. C.,

(m) *Armugam Chetty v. Ferriganuan Serovi*, 25 W. R., 81.

(n) *Brayanath Kundu Chowdhry v. Lakhi Narayan Addi*, 7 B. L. R., 211.

B brought a regular suit against A to recover the lands, and set aside this order.. *Held* by the Privy Council (reversing the decisions of the Courts below) that it was necessary for B to show a better title to the land than A could produce. It was not enough for him to prove mere possession anterior to the Magistrate's order under Act IV of 1840. The presumption was that the land of the *bheel* belonged to A, who had admittedly owned both estates before, and had retained the fisheries of the *bheel* after the auction-sale. B ought to have shown when and how, if at all, the right to the fisheries and the right to the soil were severed. (o)

The rule of law, that the statute of limitations does not bar a trust-estate, applies to express trusts, and holds only as between the *cestui que* trust and the trustee, and not against strangers holding adversely to them or either of them. (p)

"The words 'in trust for a specific purposes' in sec. 10, Act XV of 1877 are intended," said Sir Richard Garth, "to apply to trusts created for some defined or particular purpose or object as distinguished from trusts of a general nature such as the law imposes upon executors and others who hold recognized fiduciary positions."

When property is placed in the hands of another by way of trust, no cause of action arises to the owner, until there has been a demand by the owner for the restoration of the property, and a refusal by the trustee to give up the property. The period of limitation begins to run from the date of such refusal or distinct assertion of adverse right, and not from the date the trustee enters into possession. (q)

If a Muhammadan widow, without the consent of the heirs, takes possession of her husband's estate in satisfaction of her dower, and continues to hold it for forty years, the heirs of the

(o) *Rajah Barodacant Roy v. Chunder Coomar Roy*, 12 M. I. A., 145. S. C. 2 B. L. R., P. C., 1; Pandit's P. C. J., p. 402.

(p) Act XV. of 1877, sec. 10; *Kherode Money Dosses v. Durga Money Dosses*, I. L. R., 4 Cal., 455; *Ghosh v. Mackintosh*, I. L. R., 4 Cal., 897.

(q) *Rakhaldas Madak v. Modhusudan Madak*, 3 B. L. R., A. C., 409; S. C. 12 W. R., 319.

husband cannot intervene; and their claim must be brought within *twelve* years, unless they prove that the possession of the widow as to their shares was permissive or fiduciary possession. (r)

(E)—DOWER &c.

Under the English common-law, a woman, on the death of her husband, was entitled to claim a *third* part of the lands and tenements, of which her husband was seised in fee. Such portion was assignable to her by the heir or his guardian, to be held during the term of her natural life.

The widow of an Armenian, married before the Dower Act (XXIX of 1839), is entitled to dower out of lands which her husband held during the marriage for an estate of inheritance, as against a Hindu purchaser for value from the husband during his life, the English law of dower having been introduced and recognized in this country amongst Europeans and Armenians as a branch of the law of inheritance. (s)

The only law of dower applicable to British subjects (in the Presidency-towns) other than Hindus and Muhammadans is the English law. (t) In Calcutta it has always been the practice for the wife to join to bar her dower. Lands in Calcutta are usually conveyed with regular investigation of title. They are held as freeholds of inheritance; and dower is assignable out of them. Armenians have no law of their own and were before the 1st of January 1866 governed by the English law. The case of *Emin v. Emin* goes to show that dower would attach to lands in the Mofussil. There is no more inconvenience and injustice in enforcing that charge than any other. A purchaser must look to his title and see what incumbrances there are on the property. "If a Hindu governed by

(r) *Mt. Oomrao Begum v. Syud Hamud Jan*, 4 Agra Rep, 279.

(s) *Sarkies v. Prisoonnomojee Dossee*, 1 L. R., 6 Cal., 794. MR. JUSTICE PONTIFEX held, that the true construction of sec. 17 of 21 Geo. III. C. 70 (see *ante*, p. 14 note) must confine the words "their inheritance and succession" to questions relating to inheritance and succession by the defendants. The case under consideration was a question of the plaintiff's succession and therefore not determinable by the laws and usages of the Gentooos.

(t) *Emin v. Emin*, 1 Morley, 300; *Stephen v. Hume*, Fulton, 224; *Musleah v. Musleah*, 1 Bulnois; In the matter of *Ouchuck* 1 Morley, 375.

the Mitākshara law comes to Calcutta and buys land there, and a Hindu governed by the Dāyabhāga buys from him, he would buy subject to the rights of the vendor's sons, and could not contend that he was ignorant of Mitāksharâ law." (u)

Act XXIX of 1839 applies to marriages contracted before the 1st of January 1866. It extends the amendments in the English law of dower contained in the statute 3rd and 4th William IV, Chapter 105 to the territories of the East India Company in cases which, but for the passing of the Act, would be governed by the English law of dower as it existed previously to the passing of the aforesaid statute. Section 4 of the Dower Act provides that no widow shall be entitled to dower out of any land which shall have been absolutely dispensed of by her husband in his lifetime, or by his Will.

The widow's claim for dower under the Muhammadan law is only a debt against the husband's estate. It may be recovered from the heirs to the extent of assets come to their hands. It does not give the widow a lien on any specific property of the deceased husbands, so as to enable her to follow that property, as in the case of a mortgage, into the hands of a *bond fide* purchaser for value. It appears that under the Muhammadan law, there is not hypothecation without seizure, but a creditor, whether widow or any other creditor, if in possession of the husbands property with the consent of the debtor or his heirs, might hold over until the debt is paid; and the cases cited to show that the widow had a right to hold until her dower was paid off, proceeded on this principle. (v) "It is very questionable," said Mr. Justice Hobhouse, "whether the Court is bound to apply the Muhammadan law to this case under the provisions of Regulation VII of 1832, the case not being one of succession, inheritance, marriage, caste, or religious usage; but simply one of contract."

(u) *Per PONTIFEX, J.*, in *Sarkies v. Prosonno moyee Dossee*, 1 L. R. 6 Cal., 794.

(v) *Mussamat Wahidunnissa v. Mussamat Shubrathun*, 6 B. L. R., 54, approved by the Privy Council in *Duli chand's case*, L. R. 5 I. A. p. 211.

A lien for dower only arises where the estate has been expressly hypothecated for the purpose. (w)

To constitute a lien on any property, there must be a clear agreement for the specific appropriation of the property, and further the property must be in the possession of the party who claims the lien. (x)

The widow of a Muhammadan, in possession of her husband's estate under a claim of dower, has a lien upon it as against those entitled as heirs, and is entitled to possession as against them, till her claim of dower is satisfied. (y)

A creditor of a deceased Muhammadan, whether in respect of dower or otherwise, cannot follow his estate alienated by him to *bonâ fide* purchaser into the hands of a *bonâ fide* purchaser for value to whom it has been alienated by his heir-at-law, whether by sale or mortgage. Such alienee, however, is bound by any decree charging the estate passed in a suit against the heir pending at the date of alienation. (z)

A Muhammadan dying, his son N, who was in possession of the whole of the deceased's property,—mortgaged it to secure repayment of money advanced to him by the mortgagee. In the following year the three widows of the deceased brought a suit against N to assert their right of dower and obtained a decree, and in execution attached and sold the property, and buying it themselves got into possession. The mortgagee then brought a suit to obtain from the widows the property which he had purchased : It was held that until the widows brought their suit, the property in N's hands was not subject to a lien or charge in favor of them ; and that it passed free from encumbrances to the mortgagee as a *bonâ fide* purchaser for valuable consideration. It was also held that plaintiff was entitled to so much of the property as was N's share. (a)

(w) *Ameeoonnissa v. Mooradonnissa*, 6 M. I. A., 211.

(x) *Debnaram Bose v. Lish*, 2 Hyde, 267.

(y) *Ahmed Hossain v. Mt. Khadija*, 3 B. L. R., A. C., 28 ; *Syud Umed* [L. L. R., 4 Cal., 408.

Ali v. Mt. Saffikan, 3 B. L. R., A. C., 175.

(z) *Moulvie Muhomed Wajid v. Tazyuban*, L. R. 5 I. A., p. 211-24 ;

(a) *Mussamat Begum v. Doolee Chand*, 20 W. R., 92-3.

"It appears to us," said Mr. Justice Phear in this case, "that it is now settled by several decisions that the Muhammadan widow's right to dower against the estate of her deceased husband is, generally speaking, simply in the situation of a debt which she, like any other creditor, can take legal measures to enforce against such property of her husband as she can find in the hands of the heirs, or even in the hands of any other persons, provided these have taken as volunteers or with notice of her making a specific claim against that property. No doubt, if she is herself in possession of the property, she is entitled to assert a lien upon it in respect of her own debt against the other heirs, and to pay herself her own debt before she pays the debt of any one else. But if she is not in possession of the property, and if she is forced to take proceedings in order to liquidate the debt out of her husband's property, she is, until those proceedings have ripened into some act of Court against the property, simply in the position of an ordinary creditor.

"Thus it seems to us that, in this case, until the widows brought their suit in 1866, the deceased person's property in the hands of Nujimooddeen was not subject to a lien or charge in favour of the three widows. Therefore, when Nujimooddeen pledged the property in June 1866, so far as his own share as heir in the property, was concerned, he was able to pass it free from all incumbrances to a *bonâ fide* purchaser for valuable consideration. It may be the money for which an heir under such circumstances as these aliens his share is taken for the purpose of discharging his ancestor's debt, and we do not think that the purchaser is bound to see to the application. It is not contended here that the mortgagee, who took by the bond of June 1866, was not a *bonâ fide* purchaser, and did not give valuable consideration. He was therefore entitled, as we think without doubt, to the benefit of this mortgage to the full extent of Nujimooddeen's own share, notwithstanding the subsequent proceedings which were taken by the widows to assert their right for dower, and which culminated in a decree in their favour in June 1867. The mortgagee did take proceedings in 1867 to

enforce and make good his charge upon the property upon the footing of this bond ; a decree for sale was made ; and under that decree of sale the present plaintiff, an entire stranger to all the before-mentioned proceedings, bought in August 1869.

"The result of this purchase is, we think, that the present plaintiff became entitled by virtue of the title passed by the bond of June 1866 to as much of the property as Nujimooddeen himself as heir could pass, provided the terms of the bond extended to that length."

Where a Muhammadan (Shia), on his marriage, being in poor circumstances, fixed a "deferred" dower of Rs. 51,000 upon his wife, and died without leaving sufficient assets to pay such dower, and his wife sued to recover the amount of such dower from his estate, it was held by Stuart, C. J., (Pearson, J., dissenting) that, it being nowhere laid down absolutely and expressly by any authority on the Muhammadan law that, however large the dower fixed may be, the wife is entitled to recover the whole of it from her husband's estate without reference to his circumstances at the time of marriage or the value of his estate at his death, the plaintiff was only entitled, under the circumstances, to a reasonable amount of dower. It was held by the Full Bench, on appeal from the decision of Stuart, C. J., that a Muhammadan widow was entitled to the of the *whole* dower which her deceased husband had on marriage agreed to give her, whatever it might amount to, and whether or not her husband was comparatively poor when he married, or had not left assets sufficient to pay the dower-debt. (b) Under the Punjab Code, however, the stipulated dower is subject to a modification at the discretion of the Court. (c)

In the absence of any agreement by a Muhammadan husband to pledge his property to his wife to satisfy her claim to dower, she can not, after his death, claim to hold his property as hypothecated to meet that claim, for such a right does not arise,

A Muhammadan widow's lien for her dower when in lawful possession of her husband's estate.

(b) *Sugra Bibi v. Masuma Bibi*, I. L. R., 2 All., 573. [S. P. C. J. 554.
(c) *Mulkah Tajdar Buhoo v. Mirza Jahan Kadir*, 2 W. R., P. C., 55 ;

by the Muhammadan law as a consequence of the gift of dower. But where she has obtained actual and lawful possession of his estate under a claim to hold it as heir and for her dower, she is entitled to retain possession as against the other heirs, until her dower is satisfied, with the liability to account to those entitled to the property. (d)

A Muhammadan of the Shiah sect executed a deed of dower to his wife in the following terms : "I acknowledge myself a debtor for the dower of my wedded wife to the amount of Rs. 46,000 and the amount I acknowledge to be justly due, and when demanded by the said wedded wife in the payment thereof, I will raise no objection nor make any excuse, but will deliver the same to my said wedded wife." No particular property of the husband was impignorated to secure the dower and no demand was made by the wife during her husband's lifetime, though more than twelve years elapsed from the date of the deed of dower but on his death she took possession of his property in satisfaction of her claim for dower and in a suit brought by her husband's brother to recover the whole of the estate of her husband as his heir-at-law, she insisted that she had a lien on the estate for her dower.—The Sudder Court held and on appeal the decision was affirmed by the Judicial Committee, that the widow had a lien upon her deceased husband's estate for the amount of her dower and was competent to retain property to the amount of her dower or to alienate part of the estate in satisfaction of her claim. (e)

The plaintiff, a Muhammadan widow, sued to recover possession of certain property from which she had been ousted by a purchaser from the Government at a sale of the property as being the property of her son confiscated for rebellion. The plaintiff alleged that as to a two-annas share of the property in question she had been in possession as widow and heiress of her husband, that on her husband's death in 1844, her dower of 1,00,000 rupees and one gold mohur not having been paid, her son had

(d) *Mt. Bibi Bachun v. Sherkh Hamid Hossein*, 14 M. I. A., 377; 10 B. L. R., 45 (P. C.), 17 W. R., 113.

(e) *Anwar-oon-nissa v. Moarad-oon-nissa*, 6 M. I. A., 211.

relinquished his right as heir of his father to such fourteen-annas share in satisfaction or part satisfaction of her dower. In 1844, shortly after the death of the plaintiff's husband, the plaintiff was put into possession of the property in question on the recorded consent of her son, who admitted her right to dower and his inability to pay it. The Privy Council, in coming to the conclusion that the relinquishment by the son was *prima facie* absolute, and that the widow took the whole property subject to the claims of the other creditors, observed :—
 “ There appears to have been no *hyi-makasah* whereby, in the lifetime of her husband, her dower was hypothecated so as to become a first charge upon his estate ; consequently her claim in respect of dower would not have priority over the claims of other creditors. The position of the mother and son on the death of Mahomed Ali was this :—The former as ‘ sharer,’ was entitled to two annas ; the latter as residuary was entitled to the remaining fourteen annas of the estate, both rights being subject to the debts of the deceased including deferred or unpaid dower (if any). If the widow had a claim for unpaid dower, and that claim had not, by virtue of a *hyi-makasah* executed by her husband, become a preferential charge on the estate, such claim would constitute a debt payable *pari passu* with the demands of other creditors. In these circumstances, it was competent to the son, either to assign his share of his father's residuary estate to his mother by way of security for her dower (in which case she would take only a redeemable interest), or to relinquish it to her absolutely in satisfaction of her claim. In neither case would it have been essential in such a suit as this, which is for the recovery of the possession to which she was entitled and from which she has been ousted, to prove the amount of her dower ; although the omission to do so, may be urged as an argument to show that the transaction pleaded was not real but fictitious.” (f)

By Hindu common law, widows are entitled to maintenance, and right of residence in the ancestral family dwelling-house.

(f) *Mt. Humeeda v. Mt. Budhun*, 17 W. R., 525. See *ante* p. 83.

By common law the right to maintenance is one accruing from time to time according to the wants and exigencies of the person entitled. A suit for maintenance and arrears under a will is not barred after the expiration of twelve years from the testator's death under Act XIV of 1859, sec. 1, subsection 13, unless the will which confers the right thereto also creates in favour of the plaintiff a *charge* on the inheritance of the testator's estate. Separation from the ancestral house of her husband would not disentitle a Hindu widow to maintenance suitable to her rank and condition. (g)

The right of a Hindu widow to her maintenance arises by marriage, and that of a daughter by birth; it exists during the life of the father, and continues after his death. It is a legal obligation attaching upon him personally, and upon his property. He can not free himself from it during his life time, and it attaches upon the inheritance immediately after his death. It seems, therefore, contrary to principle to hold that by devising the property to another, he could authorize that other to hold it free from claims which neither he himself nor his heir could have resisted. (h) In *Bhoobun Moyee v. Ramkishore* (S. D. of 1860, I. p. 489) the Court said: "In Bengal, a widow has no indefeasible vested right in the property left by her husband, though she has by virtue of her marriage a right, if all the property be willed away, to maintenance."

Maintenance is not a charge upon property in the hands of a *bonâ fide* alienee for value. Where a person purchases property without notice of the existence of the widow's right of maintenance as a charge upon such property, it has been held that the property in his hands will not be liable for such maintenance. The amount of maintenance must be ascertained beforehand either by contract or by a decree of a Court of Justice and declared a specific charge upon the property sold, before the purchaser can be made liable for it. (i) In Bombay it has been held,

(g) *Narayan Rao Ram Ohundra Pant v. Ramabai*, L. R. 6 I. A., 114—19

(h) *Mayne on Hindu Law and Usage*, 2nd Ed. p. 400; *Ram Ohunder Dikshit v. Savitribai*, 4 Bom. H. C., A. C. 73.

(i) *Per* SIR R. COUCH in *Juggernath Samant v. Maharanee Adheranee Narain Kumari*, 20 W. R., 126; *Golab Koonwur's case*, 4 M. I. A., 246.

that the mere circumstance of a purchaser having notice of a widow's claim for maintenance, is not conclusive of the widow's rights against the property in his hands. (j)

Where the widow obtained a decree fixing a certain sum as her maintenance to be obtained out of certain property, it was held that she has a right to have this amount declared as a charge upon the property into whatsoever hands it may come. (k)

Where a purchaser purchases property from the heir with notice that a Hindu widow is entitled to be maintained out of it, the property in the hands of the purchaser continues to be charged with that maintenance. Before following properties from which she is entitled to obtain her maintenance in the hands of the purchaser, a Hindu widow is not bound in all cases to attempt recovering her maintenance from the heir-at-law. (l)

As against one who takes as heir, a Hindu widow has a right to maintenance out of the property in his hands. She also has a right to maintenance out of such property in the hands of any one who takes it with notice of her having set up a claim for maintenance against the heir. By the law of Bengal she has *no* lien on the property for her maintenance against all the world irrespective of such notice. "It would be most unreasonable," said Mr. Justice Phear, "that a *bonâ fide* purchaser for valuable consideration should be subjected to the possibility of a charge springing up at any time, though it had no definite existence when he purchased. Lien for maintenance is a somewhat vague expression as long as the amount of maintenance is undetermined. It does not in my mind attain the character of a proprietary right, until the proper amount of maintenance is either ascertained, or is in the course of being ascertained. When property passes into the hands of a *bonâ fide* purchaser without notice, it can not be

(j) *Lakshman Rām Chundra Joshi v. Satyabhāma Bāi*, I. L. R., 2 Bom. 494.

(k) *Kumari Debhya v. Roy Lutchmeeput Sing*, 23 W. R., 33.

(l) *Goluck Chunder Bose v. Ranee Ohillu Dayee*, 25 W. R., 100.

affected by anything short of an already existing proprietary right; it can not be subject to that which is not already a *specific* charge or which does not contain all the elements necessary to its ripening into a *specific charge*.”(m) Following this decision, Mr. Justice L. Jackson held that the lien of a Hindu widow for maintenance out of the estate of her deceased husband is not a charge on that estate in the hands of a *bona fide* purchaser irrespective of notice of such lien, and that she may, by obtaining a mere personal decree against her husband’s heir, lose her charge upon the estate. (n)

Grants of property made for the maintenance of the widow or any other person, determines on the death of the grantee, and is resumable by the grantor or his heirs, unless there is anything to the contrary in the express terms of the grant where there is a written instrument in evidence of it. The presumption always is that the income only was granted, and not the *corpus*. (o) But of course there is nothing to prevent an owner making over landed property absolutely in full discharge of all claims for maintenance. A grant so made would pass the fee and be absolutely at the disposal of the person to whom it was given. (p)

Though the maintenance of a wife and children may in certain circumstances be a charge on the husband’s property as against a purchaser, it is not so in a case in which the sale took place in payment of a family debt, which it was the primary duty of the head of the family to pay. (q)

Debts contracted by a Hindu take precedence of his widow’s claim for maintenance, and it seems, that if a portion of his property is sold after his death to pay such debts, the widow cannot enforce her charge for maintenance against such property in the hands of the purchaser. (r)

(m) *Srimati Bhagabati Dossee, v. Kanailal Mitter*, 8 B. L. R., 225.

(n) *Athuvani Narain Coomary v. Shona Malie Pal Mahadai*, 1. L. R., 1 Cal., 365.

(o) *Rajah Wondoy Aditto Deb v. Mukondal Narain Deb*, 22 W. R., 225.

(p) *Nursing Deb v. Roy Koylash Nath*, 11 M. L. A., 55.

(q) *Natchiarammal, v. Gopalakrishna*, 1. L. R., 2 Mad. 126.

(r) *Joshi v. Satyabhambhai*, 1. L. R., 2 Bom. 494; *Coomary v. Mahadai*, 1. L. R., 1 Cal., 366.

The Hindu widow's right of residence in the Family D. House The Hindu widow is further entitled to reside in the family dwelling-house of her husband. The son or other heir cannot turn her out, much less a purchaser from such heir ; (s) for it is in the family that, in the strict contemplation of law, she ought to reside. (t) "It seems to me," said Sir Barnes Peacock, "that the passage in *Katyayana*,* 2 *Colebrook's Digest*, p. 133 is a restriction and not a mere moral precept, and that the heir of a deceased ancestor has not such a right in the dwelling of the family that he can at once, of his own pleasure, turn out all the females of the family, or sell it and give the purchaser a right to turn them out." (u)

In a suit for maintenance brought by a Hindu widow against her husband's brother, who was the sole surviving member of that husband's family, and against *bond fide* purchasers for value from him of certain ancestral immovable property of the family, it was held that if the property were sold in order to pay debts (*not* incurred for immoral purposes) of her husband, or his father, or grandfather, or for the benefit of the undivided family, or to satisfy a former decree obtained by the plaintiff herself against her husband's brother for maintenance, such sale would be valid against her, whether or not the purchasers had notice of her claim. (v) In this case most of the authorities on the subject of Hindu widow's maintenance were reviewed by Mr. Justice West in his very learned and lucid judgment. "According to the *Mitāksharā*," said Mr. Justice West, "sons must, from the moment of their father's death, be regarded as sole owners of the estate, yet with a liability to provide for the maintenance of

(s) *Mungala Debee v. Dinonath Bose*, 12 W. R., 35 A. O. J., 4 B. L. R., O. C. 72; See also *Gouri v. Chundramani*, I. L. R., 1 All., 262.

(t) *Deo v. Deo*, I. L. R., 1 Mad., 81.

(u) 4 B. L. R., O. C., 79.

(v) *Per* SIB M. R. WESTROP, C. J., and WEST, J., in *Joshi v. Satyabhamabai*, I. L. R., 2 Bom., 494.

* "Except his whole estate and his dwelling-house, what remains after the food and clothing of his family, a man may give away, whatever it be, whether fixed or movable; otherwise it may not be given". 2 *Colebrook's Digest*, p. 133.

their father's widow, and with a competence on the widow's part to have the estate made answerable. In the case of a widow of an ordinary co-parcener as against the surviving members of the joint family, *her* claim being strictly to maintenance only, regulated by the circumstances of the joint family, it appears that, although she may have her maintenance made a charge on the property, yet if she should refrain from that course, she leaves to the co-parceners an unlimited estate to deal with at their discretion and in good faith. The widow's claim for maintenance, although it is not 'an already existing proprietary right,' *does* contain all the elements necessary for its ripening into a specific charge : it only needs formal assertion to obtain recognition. The charge must, I think, be regarded as an *equitable* one of a special kind, capable of conversion into a perfect right *in re*, and enforceable in all cases in which the mother or step-mother living apart is not maintained by the sons, but not in other cases, except under circumstances which affect the good faith of a transaction whereby it is sought to get rid of the burden. It cannot be said that, under the Hindu law, the heir's or surviving co-parcener's conscience is not affected by the widow's claim to maintenance out of the estate he has taken. It is the object of a direct injunction ; and the purchaser, who joins him in defeating that provision, may properly be himself made subject to the charge. If there is an ample estate out of which to provide for the widow, so that she may still get her claim fixed and secured, or, if knowing of the proposed sale, she does not take any step to secure her own interest, no imputation of bad faith, or of abetting it, can be made against the purchaser of a portion of the joint property. If the widow, on the other hand, is not accepting support from the co-parcener in satisfaction of her claim ; if she lives apart, and the estate is small and insufficient, *it is the vendee's duty before purchasing to inquire into the reason for the sale*, and not by a clandestine transaction to prevent the widow from asserting her right against the intending vendor. It is in this connexion that the doctrine of notice becomes of importance, and thus in

Srimati Bhagabati Dasi v. Kanailal Mitter, (w) Phear, J., says, the widow 'may also, doubtless, follow the property (for her maintenance) into the hands of any one who takes it as volunteer or with notice of her having set up a claim for maintenance against the heir.' The distinction taken between the volunteer and the alienee for value, rests rather on English than on Hindu notions ; and for 'notice of her having set up a claim' we should rather substitute 'notice of the existence of a claim likely to be unjustly impaired by the proposed transaction ;' but in so far as notice is recognized as making an important difference, the principle is correct and important.

"Under the English law the knowledge of collateral rights frequently qualifies those acquired by a purchaser ; there is a class of cases for instance, of which it is said that 'where the right comes into existence by covenant, the burden does not, at law run with the servient tenement ; but equity says that a person who takes it with notice that a covenant has been made, shall be compelled to observe it.' (x) The widow's right to maintenance does not come into existence by covenant, but it is a right maintainable against the holders of the ancestral estate in virtue of their holding, no less through the operation of the law than if it had been created by agreement ; and so, when the sale prevents its being otherwise satisfied, it accompanies the property, as a burden annexed to it, into the hands of a vendee with notice that it subsists. The law steps in only to counteract what it regards as a furtherance of an unconscientious attempt to evade a sacred duty. Equity, as between the vendee and vendor, will make the property retained by the latter *primarily* answerable ; but such property there must be to make the sale and purchase free from hazard where the vendee has knowledge or the means of knowledge of a widow's claim which cannot be satisfied without recourse to what he proposes to buy.

"As the Hindu wife, upon her marriage passes into and becomes a member of her husband's family, it is upon that

(w) 8 B. L. R. at p. 228.

(x) *Per* MELLISH, L. J., in *Leech v. Schweder*, L. R. 9, Ch. Ap., 475.

family that, as a widow, she has her claim for maintenance, (y) and her right is not extinguished by any wilful or negligent diminution of the means of satisfying it. That surviving co-parceners, by merely selling the estate or changing its form, should be able to get rid of the obligations properly attached to it, (z) would be a premium on trickery opposed equally to the spirit of the Hindu as of the English law. Whether such a claim by a widow against the estate of her deceased husband in the hands of a purchaser, is enforceable or not, does not depend upon whether the remainder of the estate in the hands of the heir has been exhausted, for exhaustion would not create for her a new right. *What was honestly purchased, is free from her claim for ever*: what was purchased in furtherance of a fraud upon her, or with knowledge of a right which would thus be prejudiced, is liable to her claim from the first. The relations of the parties are determined once for all at the moment of the sale.

“In the case even of co-parceners not having a mother or sister to provide for, it has been definitely ruled that the Court in decreeing a partition may properly assign an adequate portion to the widow of a deceased co-parcener as a source of subsistence during her life. (a) Upon a voluntary partition, her right remains after the division what it was before, a right to maintenance and nothing more, or, at most, should she advance a definite claim, to a provision, determined according to circumstances, out of the property. The reduction of the number of surviving co-parceners to a single person makes no difference in the widow's legal position. The rights and obligations of the original co-parceners fall at last to the sole survivor. The widows must be maintained by him out of the property that has become burdened with that incumbrance; but he is not, therefore, fettered in dealing with the estate at his discretion, in the absence of actual fraud or of a decree which has converted some widow's claim into an actual right *in re*. The

(y) For JUDICIAL COMMITTEE in *Sri Viradu Pratapa Raghunatha Deo v. Sri Broze Kishore Patt Deo*, I. L. R., 1 Mad., 81.

(z) See 7 N. W. P. H. C. Rep., 261. (F. B.)

(a) *Rampersaud Tewary v. Sheo Churn Doss*, 10 M. I. A., 490.

purchaser from him, as in the familiar case of a sale by a father-in-law, takes a perfectly good title, and one which, if good at the time, cannot be impaired by subsequent changes in the circumstances of the vendor's family.

"In the present case, we have it found as a fact that the purchaser Lakshman (defendant No. 2) was aware of the existence and of the claim to maintenance set up by the plaintiff Satyabhâmâbâi, widow of the brother of the vendor Mahâdev. For proper reasons, as for the discharge of a debt incumbent on the family and on him as its sole surviving proprietary member Mahâdev might sell the estate which had thus vested in him. He could not thus affect the right of another co-parcener's widow Sarasvatibâi, whose claim had by means of a decree become a right *in re* adhering to the estate; but the right of Satyabhâmâbâi, not yet reduced to definiteness and made a precise and actual charge on the property, could not prevent his dealing with it at his discretion. If he sought to defraud her, he could not, indeed by any device in the way of parting with the estate, or changing its form, get rid of the liability which had come to him along with the advantage derived from his survivorship; and Lakshman—taking from him with reason to suppose that the transaction was one originating not in an honest desire to pay off debts, or to satisfy claims for which the estate was justly liable, and which it could not otherwise well meet, but in a design to shuffle off a moral and legal liability—would, as sharing in the proposed fraud, be prevented from gaining by it; but if, though he knew of the widow's existence and her claim, he bought upon a rational and honest opinion that the sale was one that could be effected without any furtherance of wrong, he has, as against the plaintiff, acquired a title free from the claim which still subsists in full force as against the recipient of the purchase-money, Mahâdev. As to Vishnu (3rd defendant), the sub-purchaser of part of the property, the same considerations apply. He knew of Satyabhâmâbâi's position and her claims. If, with this knowledge, he chose to purchase from Lakshman, himself but recently become vendee, he took the

property with the same risks as Lakshman. If he acted in good faith and with due care, he is entitled to protection for his purchase." (b)

It is a rule of law that the crown, on taking lands by escheat or by forfeiture, takes the title which the last owner had, and none other. If such title is a mere life-estate or a term for years, the estate of the reversioner or remainder-man is not destroyed or divested by confiscation or forfeiture of the particular estate. (c) If such title is a mere legal or apparent one as that of a benâmidâr, the forfeiture or confiscation passes nothing to the Crown. Where, therefore, at the time of annexation of Oudh by the British powers, a Râjâh, incurred the grave displeasure of the authorities and an order went forth confiscating half his estate and the Râjâh thereupon concealed from the Government officials the real ownership of certain villages of which he was the nominal or registered taluqdar in trust for his brother's widow and contrived to have them confiscated in part-satisfaction of such order, it was held that the widow was the acknowledged *cestui que trust* of the registered taluqdar, who had bound himself expressly in writing that he would respect her rights if she permitted him to be alone so registered ; that it would be a scandal to any legislation if it arbitrarily and without any assignable reason swept away any such rights ; and that the lady being clearly, as she was the equitable owner, the decree of confiscation against her trustee could on no principle of law, equity or good conscience, be made to affect her, and certainly not to justify a sentence which in effect, made her the sufferer for his offence. (d) In a sale of confiscated property, the Government stands in the position of a private vendor selling by auction, (e) and the vendee acquires no better title than the Government has.

(b) *Lakshman Ramchundra Joshi v. Satyabhamabai*, I. L. R., 2 Bom, 495—525. See *ante*, p. 55.

(c) Act XLV of 1860, sec. 61 and 62. Under the Indian Penal Code it is only the personal rights of the convict which are transmitted to Government, by a sort of statutory conveyance. Mayne's Penal Code, p. 33.

(d) *Mt. Thakurain Sookraj Koonwar v. The Government and Baboo Ajit Singh*, 14 M. L. A., 112. Pandit's P. C. J., Vol. II., 705.

(e) *Sheo Lal Bokra v. Sheikh Mahomed*, 13 W. R., (P. C.) 4.

Section 2.—Evidence of Title.

When a title depends on inheritance, the pedigree must be proved by certificates of birth, death and marriage in the case of Europeans, by horoscopes and entries in family almanacks of such events in the case of Hindus and Muhammadans, by letters of administration or *warâsatnâmâs** in case of intestacies, and by affidavits or declarations of neighbours and relatives where no other evidence is available.

In proving a native pedigree, the oral statements of deceased relatives has been admitted in the absence of any registers of births or deaths. (f) Birth during marriage is conclusive proof of legitimacy. (g)

Reputed ownership is made up of the opinions of a man's neighbours: it is a number of voices concurring, upon one or other of two facts. (h)

The genuineness of a will may be evidenced by production of the probate thereof.

Discharges for legacies or other sums charged upon immovable property must be produced, notwithstanding twelve years may have elapsed since they became payable, as the claims may still subsist in consequence of the minority or other disability of the person entitled, or an intermediate acknowledgment may have been given by the devisee, heir, executor or other trustee.

Abstracted deeds are usually proved by production of the originals. Documents thirty years old, and coming from proper custody are assumed to be genuine without further proof. In case of loss or destruction of the original being proved, secondary evidence may be given of its contents and due execution.

When the vendor claims by descent, he must show that the ancestor, from whom he derives his title, was the last absolute owner of the land agreed to be sold, and that he is such ancestor's heir-at-law.

(f) *Mohedeen Ahmed Khan v. Syud Mahomed*, 1 Ind. Jur., O. S., 132.

(g) Act I of 1872, sec 112.

(h) Macnaughten's M. L. Chap. V.

* Certificate of heirship.

The seisin of the ancestor may be proved by showing that he was either in the actual possession of the premises at the time of his death or in the receipt of rent from the tenants thereof; in as much as possession is presumptive evidence of a seisin-in-fee until the contrary be shown. (i)

Seisin may be presumed from facts tending to show that the ancestor or testator appeared to be the owner; *e. g.* by the production of leases or their counterparts (kabuliats) by rent receipts given to persons in possession of the land or premises, and by the declarations of the tenants and occupants thereof.

A deed duly executed is *primâ facie* evidence that it is genuine and that the consideration has been paid and received as stated, but it is not conclusive; and the purchaser must invariably see that his vendor has been in possession of the property intended to be sold, under and consistently with the deed.

In the absence of or deficiency in proof of the existence or due execution of material documents, presumption that such documents did exist and were duly executed is admissible as between vendor and purchaser, if possession has been consistent with the *primâ facie* title. As a general rule, a purchaser would be bound to admit such presumptions.

Registered deeds may be proved by production of certified copies (of the originals) under the seal and signature of the local Registrar, if such originals have been lost or destroyed or are not in the possession of the vendor.

A document thirty-years old does not prove itself, in the absence of evidence, that it has come from the proper custody. (j)

With regard to the proof of ancient documents the proper rule is, that if they are more than thirty years old they need not be proved, provided they have been so acted upon or brought from such a place as to offer a reasonable presumption that they were honestly and fairly obtained and preserved for use and are free from suspicion

Proof of ancient documents
—Thirty years' rule.

(i) *Premrâj Bhavânîram v. Nârdyana Shivarâm*, I. L. R., 6 Bom. 222.

(j) *Gurudâs Dey v. Sambhu Nath Chuckerbutty*, 3 B. L. R., A. C., 258.

of dishonesty. (k) A Court, however, is not bound to accept as genuine the signature on a document upwards of thirty years old, even though it be produced from proper custody. Before accepting such document as proof of title, the Court must satisfy itself that the person who purports to have affixed his signature to the document was a person who at the time was entitled to grant such a document. The Court *may* presume but it is not bound to presume. A purchaser of a zamindari at

The Privy Council on 30 years' rule. an execution-sale, when attempting to take possession, was met by the defendants, who set up

a *nirdsi* lease alleged to have been granted to them 47 years before. Their Lordships of the Judicial Committee said: "In order to satisfy the Court that such a document was a valid document, intended to operate as a *mirāsi* tenure, it would be important to prove that possession had accompanied it. The document itself was not proved, because it was more than 30 years old, and there were no witnesses to prove it. It was necessary therefore, in order to establish its authenticity, to show that possession had accompanied it." (l) Even where a deed or other document is so old that it is not reasonable to expect proof of the factum of its execution, its authenticity must be made out in some reasonable way; the usual method being parol testimony as to the facts of its custody. (m)

The mere production of a prior conveyance is no evidence that the person producing the same has obtained a conveyance from the person to whom the property was thereby conveyed; more especially when the person who produces the document is not, and never has been, in possession of the property. (n)

If a party put in evidence in support of his title, documents proved to be forged, but the other evidence adduced by him is not impeached, the Court, in rejecting the forged documents, will take the unimpeached evidence into consideration,

(k) *Vithal Mahadev v. Daud Valad Muhammad Husen*, 6 Bom. H. C. Rep., A. C. J., 90.

(l) *Bhisheshar Bhuttacharjee v. Lamb*, 21 W. R., (P. C.), 23.

(m) *Mussummat Ferozeonissa v. Ram Onagra Singh*, 21 W. R., 19.

(n) *Per* SIR B. BARNES PEACOCK, C. J., in *Clarke v. Brindaban C. Sirkar*, Marsh., 77, S. G. W. B. F. B. 20; Ind. Jar., O. S., 97.

and if satisfied, adjudicate thereon. (v) Although in India the presumption in favour of the genuineness of documentary evidence is very weak, yet there is no presumption in favour of forgery. Thus, when a long series of documents are produced, showing a reasonable origin of title nearly a century ago, a regular deduction of that title, and a possession consistent with it, the evidence of intrinsic improbability must be very strong to counterbalance the weight of such evidence. (p)

When the ownership of leasehold property becomes vested in the owner of the reversion, or the lessee acquires the reversion, the leasehold estate would ordinarily merge, and the owner would not hold as a lessee but in full proprietary right.

In establishing a title to land in a Court of Justice, the Pottah as an evidence of title. potlah is not necessary; it frequently happens that after the title-deeds are produced and proved, the potlah also is produced; but there are instances in which parties have recovered without the potlah. The potlah therefore, forms no part of the title. It is the conveyance that gives parties a right to claim the potlah; and by having the latter, the amount of the sum payable to the Government is ascertained and future doubt prevented. (q) The purchaser, however, must always enquire after and inspect the potlah, for it is not seldom that the potlah is pledged as security for an advance.

The antiquity of a potlah is no presumption of its genuineness. (r) The fact of a potlah being more than 30 years old has been held not to do away with the necessity of proof, before it could be used as evidence in a Court of Justice. (s)

Proof of uninterrupted user for 12 years and upwards is sufficient to establish a prescriptive right to water. The term "burrabur", in respect to user was construed to mean "all along" or "always," certainly for

(v) *Seveaji Vijaya Raghunadha Valoji Kristnan Gopalur v. Chinna Nayana Chetti*, 10 M. I. A., 151. See also *Rani Surnomoyee v. Maharaja Saitish Chunder Roy*, 10 M. I. A., 124. Pandit's P. C. J. Vol. II., 61, 88.

(p) *Wise v. Bhobun Moyee Debia Chowdrainee*, 10 M. I. A., 165.

(q) *Freeman v. Fairlie*, 1 M. I. A., 305. Pandit's P. C. J. Vol. I., 126.

(r) *Allucka v. Kushi Chunder Dutt*, 1 W. R., 131.

(s) *Fazil Sirdar v. Chenum Biswas*, 10 W. R., 237.

more than 12 years. (t) In this country while the law recognizes that rights may be gained by long and continuous enjoyment, *i. e.*, by prescription, no particular period is necessary for the establishment, generally, of a prescriptive right. (u)

In a suit to enforce a right of easement on the ground of user, the Lower Appellate Court was held to have done wrong in refusing to go into enquiry as to the length of time plaintiff had enjoyed the user, because the right of the defendant also was of very short standing. A party cannot be allowed in equity to stand by and see his own rights infringed without complaining in any way of such infringement, but is bound at once to do his best to prevent a permanent obstacle being put in the way of his enjoyment of these rights. (v)

A plaintiff's right of user of a pathway to certain premises cannot be affected by the existence of another path, by which he may obtain access to the same premises. (w)

A right of user over a pathway may be established notwithstanding that the path passes over waste land.

A temporary interruption, such as during the rainy season, cannot affect a right of user. (x)

An exclusive right of fishery (*jalkar*) in a navigable river, set up against the ordinary rights of the State and the community, must be established by clear and strong evidence.

Possession and enjoyment for a series of years are cogent evidence of title. (y) A private right of fishery in a tidal navigable

Jalkar or Fish-
ery Rights in a
tidal river. river must, if it exists at all, be derived from the Crown, and established by very clear evidence, as the presumption is against any such private right.

A mere recital in quinquennial papers that a person is the owner of *jalkar* rights in a zamindari permanently settled with him by Government is not sufficient to give to such person a

(t) *Kartick Chunder Sirkar v. Kartick Chunder Dey*, 11 W. R., 522.

(u) *Kisto Mohun Mukerjee v. Jaggernath Roy Joogee*, 11 W. R., 236.

(v) *Nil Kanti Sahoo v. Jujoo Sahoo*, 20 S. W. R., 328.

(w) *Makondonath Bhadoory v. Shib Chunder Bhadoory*, 22 S. W., 302.

(x) *Shaiikh Mahomed Ansur v. Shaiikh Sefatollah*, 22 S. W. R., 340.

(y) *Bagram v. The Collector of Bhulloca*, W. R., 1864, 243.

right of fishery in a public navigable river; any right granted under such word *jalkar* would be perfectly satisfied, if construed to apply exclusively to a right to fish within enclosed water such as a *jhil* in a zamindari. (z) for ordinarily and presumptively no man can have an exclusive right to fish in tidal navigable rivers, and according to *Gureib Hossein Chowdhree v. Lamb* (u) it was necessary for persons claiming rights in navigable rivers to show that such right had been acquired by grant or prescription, which is evidence of a grant.

It has been held by the Privy Council that *jalkar*, or right of fishery, may exist in India as an incorporeal hereditament, and as a right to be exercised upon the land of another. (b) Sir J. Colvile cited with approval the case of *Luckee Dosee v. Khatimu Babee* (c) decided by the late Sudder Court with the concurrence of Mr. Colebrook. In this case A had purchased at a public sale by the Collector, the *jalkar* of certain *jhils*. One of them became dry, and it was determined that A's purchase of the *jalkar* only did not convey any property in the lands which belonged to the proprietor of the *jhil*, but the *jalkar* was held, so long as the land was covered with water, to exist as a separate right, and a right belonging to the purchaser.

In a dispute about *jalkar* between the proprietors of neighbouring estates, where the title-deeds do not specify the pieces of land or water in contest, the title must depend on possession. (d)

A mere act of fishing in a tank is no proof of ownership. (e)

Jama-wasil-baki papers, kept in the regular course of business, are at the best corroborative evidence, not independent testimony. (f)

Thakbust papers are *prima facie* evidence against the proprietors of estates comprehended in them. (g)

(z) *Prosonno Coomar Sircar v. Ram Coomar Parooey*, I. L. R., 15 S. D. A., Rep., 1859, 1357. [4 Cal., 53.]

(b) *Forbes v. Meer Mahomed Hossein*, 12 B. L. R., (P. C.) 210.

(c) 2 Sel. Rep., 51. See also *Bissen Lal Duss v. Rani Khyrunnissa Begum*, 1 W. R., 79.

(d) *Shama Sundari Debya v. The Collector of Malda*, 12 W. R., 164.

(e) *Syud Ertaza Hossein v. Hurree Pershad Singh*, 5 W. R., 281.

(f) *Beejoy Gobind Bural v. Bhickoo Roy*, 10 W. R., 291.

(g) *Kalee Tara Debya v. Nittanund Shaha*, 12 W. R., 90.

Unattested dakhilas, without corroborative evidence, are not in law sufficient evidence of payment of rent. (h)

Receipts of payment of Government revenue are not sufficient evidence of title or possession. (i) Receipts of rent purporting to have been given by the former owners of a jote, are not admissible in evidence without proof as to the hand writing of the parties who gave them, or some satisfactory account of the custody from which they came. (j) The receipt of rent by a landlord is no confirmation by him of an alleged lease in perpetuity. (k) Mere proof of possession for more than twelve years does not amount to proof of a mukuriani title. (l)

A recital in a deed of mortgage granted by one of two undivided brothers to a third party, that a division had taken place between the mortgagor and his brother, is no evidence of separation as against the latter or his representatives. (m) Similarly a recital in a lease granted by the husband of his wife's property that he was empowered by muktiarnámá to manage her business generally, is not evidence against the wife that such a muktiarnámá existed. (n) The recital of necessity in a lease or bill of sale is not *per se* legal evidence of the existence of the necessity, which under the Hindu law may justify an alienation by a mother or grandmother. (o)

Recitals as to matters of pedigree or relationship by blood, marriage or adoption contained in any deed, will or other document are admissible as *prima facie* evidence of the truth of such pedigree or relationship. (p) Where a statement in any ancient deed, will or other instrument relates to any transaction whereby any right was created, modified or extinguished such

(h) *Kazee Odiut Zuman v. Mohioodeen Ahmed alias Mogul Jan*, 9 W. R., 241.

(i) *Burn Deonarain v. Ram Lall Chowdhery*, 3 W. R., 133.

(j) *Womesh C. Mookerjee v. Bama Dossee*, 7 W. R., 15.

(k) *Rudhakant Dutt v. Munakant Sen*, W. R. 1864, p. 14.

(l) *Shew Dayal Peeri v. Thakur Mohabir Prosad*, 2 B. L. R., Ap., 81; 10 W. R., 477.

(m) *Gopal Gobind v. Narayan Bin Toohajee*, 1 Bom. Rep. 31.

(n) *Bhiku Naram Singh v. Mt. Nikot Koor*, Marsh., 373.

(o) *Obhoy Ohurn Dass v. Meer Sahab Ali*, 5 W. R., 244.

(p) The Indian Evidence Act, sec. 32, cl. 6.

transaction may, as between the vendor and the vendee, be assumed to have taken place. (q)

Recitals or statements as to marriage, death, failure of issue and the like contained in any deed will or other document, or upon any family portrait, tombstone or mural inscription, frequently render further evidence of those facts unnecessary.

A recital in a deed of sale by a Hindu widow of her deceased husband's property, setting forth that the alienation was necessary for the purpose of paying his debts, is not of itself evidence of such necessity; nor does the attestation of a relative import his concurrence. Such a transaction may become valid by the consent of the husband's kindred, but kindred in such case must generally be understood to be all those who are likely to be interested in disputing the transaction. At all events there ought to be such a concurrence of the members of the family as suffices to raise a presumption that the transaction was a fair one and justified by Hindu law. (r)

It has been held by the Privy Council that, according to the practice in India, the recital in a deed of the payment of consideration money is not conclusive evidence of such payment. (s)

It is of great importance not on light grounds to be satisfied without the production of the muniments of title. Where an old deed recites prior deeds, and the seller is unable to procure the instruments recited, the true inquiry is, whether the absence of the deeds recited throws any reasonable doubt upon the title. Where there is a title of sufficient age without the aid of the recited deeds, and no circumstance to repel the presumptions in favour of the title, the Court will compel the purchaser to accept it. (t)

A title may be a good one, although there are no deeds, especially where there has been such a long uninterrupted

(q) The Indian Evidence Act, sec. 32, cl. 7.

(r) *Raj Lukhee Debee v. Gokul Chunder Chowdhery*, 13 M. I. A., 209; also 3 B. L. R., P. C., 57. Pandit's P. C. J. Vol. II., 518.

(s) *Chowdhery Debee Pershad v. Chowdhery Dowlat Singh*, S. P. C. J. 161. See also *Lolita Dassia v. Rutton Mollee Bhattacharjya*, 10 W. R., 208.

(t) Sugden's V. and P., 11th Ed., 459.

possession, enjoyment and dealing with the property, as to afford a reasonable presumption that there is an absolute title in fee-simple. (u)

Possession, except where it is of such a length and character as of itself to constitute title, is merely evidence of title, and is so only because undisturbed possession without anything more is presumed to be referable to rightful title and absolute ownership. (v) Possession is *prima facie* evidence of title, and it need not be long in order to be some evidence of title. (w) The fact of possession has been held to prove that the property was purchased for and on behalf of the possessor. (x) "He that hath possession," said Lord Chancellor Clarendon, "hath right against all but him that hath the *very right*." (y)

In *Asher v. Whitlock* (z) cited with approval by the Bombay High Court in *Premrāj Bhavānirām v. Narāyān Shivarām* (a) it was held that a person in possession of land, without other title, has a devisable interest; and the heir of his devisee if turned out by any person other than the true owner, is entitled to maintain an action of ejectment against him. "I take it as clearly established," said Cockburn C. J., "that possession is good against all the world except the person who can show a good title; and it would be mischievous to change this established doctrine. There can be no doubt that a man has a right to devise that estate which the law gives him against all of the world, but the true owner. We know to what extent encroachments on waste lands have taken place; and if the lord has acquiesced, and does not interfere, can it be at the mere will of any stranger to disturb the person in possession?" The fact of possession, therefore, is *prima facie* evidence of absolute

(u) *Ottrell v. Watkin*, 1 Beav. 361.

(v) *Kally Churun Sein v. Adoo Sheikh*, 9 W. R., 602.

(w) *Puran Chunder Mukerjee v. Protap Narain Paul*, 9 W. R., 120.
See also *Mahesa Prosad Sing v. Mahabir Sing*, 1 L. R., 7 Cal., 593.

(x) *Syed Mahomed Shumsool Hoada v. Syed Moneerul Hug*, 2 W. R., 41.

(y) *Smith v. Oxenden*, Chan. Ca. 25.

(z) L. R., 1. Q. B., 1.

(a) L. L. R., 6 Bom. 215-24.

ownership of the possessor, mere possession being a good title against all persons except the rightful owner.*

The mere assertion of an adverse title will not enable a mortgagee in possession or a purchaser from him to abbreviate the period of 60 years which the law allows to a mortgagor to prosecute his right to redeem and seek his remedy by suit. (b)

A deed duly executed is *prima facie* evidence that the conveyance is genuine and that the consideration has been paid and received as stated ; but it is not conclusive, and the purchaser is bound to see whether the vendor has been in possession under it and consistently with it. Where there is a benâmidâr or nominal owner, and the vendor alleges himself to be the beneficiary or the real owner, the purchaser should inform such benâmidâr, and complete the bargain with his knowledge, consent and concurrence. If the benâmidâr wrongfully and mischievously sets up an adverse or hostile title, the purchaser should withdraw, unless his vendor can produce all the title deeds relating to the premises contracted to be sold, and can show to his satisfaction an uninterrupted possession as of right for more than twelve years. Added to these facts, if such benâmidâr is, as is very often the case, a man of straw, the purchaser should not *a fortiori* hesitate to complete his purchase, but may take the additional security of a bond of indemnity from his vendor enforceable on eviction or the cancellation of the sale by a Court of Justice.

(b) *Shoopul v. Khudim Hussein*, 7 N. W. P. H. C. R., 220.

* A person in possession of property which is sold in execution as that of another, is not called upon, when suing to establish his title, to prove his proprietorship as by an action *in rem* against all the world. It is enough if he establishes a good title as against the judgment-debtor whose right has been sold ; and as he is in possession, that possession in itself affords a ground for an assertion of full proprietorship for the purpose of the suit except so far as the right vested in the judgment-debtor can be shown affirmatively to contradict or qualify it. Mere possession constitutes a derivable interest, and is *a fortiori* an interest requiring affirmative proof of a superior title on the part of any one who seeks to disturb it, and, therefore, where a person in possession of property which has been sold in execution as being the property of another, sues to establish his title to such property, the burden of proof lies *not* upon him, but upon the person who claims as purchaser at the execution sale. *Per WISS, J.*, in *Premraj Bhavadni v. Nârdyan Shivarâm Khute*, 1 L. R., 6 Bom. 215—16. See also *Radhu Pyari v. Nobin Chandra*, 5 B. L. R., 708, 712 ; The Indian Evidence Act (I. of 1872), sec. 110.

Section 3.—Search for Incumbrances.

(A)—SEARCHES IN THE LOCAL REGISTRIES.

Such perfect security is now afforded by registration that there appears to be hardly room for the plea of purchase without notice. (c) A purchaser, therefore, should never omit to search for incumbrances at the Registry office of the district wherein the property is situate.

The defendant deposited certain title-deeds with the plaintiff as security for the repayment of Rs. 1,200 lent him by the plaintiff at the time when the deposit was made. On the evening of the same day, the defendant, by way of further security, gave to the plaintiff a promissory note for the amount of the loan, and endorsed thereon the following memorandum :—"For the repayment of the loan of Rs. 1,200 and the interest due thereon of the within note of hand, I hereby deposit with the plaintiff, as a collateral security by way of equitable mortgage, title-deeds of my property, &c." It was held that the memorandum did not require registration. The equitable mortgage was complete without the memorandum ; the memorandum was not a writing which the parties had made as the evidence of their contract, but only a writing which was evidence of the fact from which the contract was to be inferred. (d)

The search for incumbrances cannot be effectual in all cases so long as equitable mortgages,* created by the deposit of title-deeds are not required to be registered. (e) Still it can never be deemed safe to dispense with the usual searches for attachments in the Civil Courts and for mortgages, rent-charges and other incumbrances in the local registries where the property is situate.

(c) *Per MELVILLE, J.*, in *Sobhag Chand Golab Chand v. Bhar Chand*, I. L. R., 6 Bom., 206. See Act IV of 1882, sec. 59.

(d) *Kedernath Dutt v. Sham Lal Khettry*, 11 I L R., 406. [p. 188.

(e) *Ibid*, 11 B. L. R., 405. See also Belchamber's Rules and Orders, * Under Act IV of 1882, sec. 59, equitable mortgages by deposit of title-deeds with the creditor or his agent, are valid when made in Calcutta, Bombay, Madras, Bangoon and Karachi, all seats of flourishing seaport

By contract and deposit of title-deeds B charged certain land in favor of A, as a security in respect of the non-delivery of the title-deeds of an estate bought by A from him. After the creation of this charge the land was transferred by B to C. The Sudder Court having decided that the contract was not operative as an hypothecation or pledge, even between the parties to it, and that A had no right of suit against C, to whom the land had been transferred,—*Held* by the Privy Council, reversing that decision, that an agreement created a lien on the land, and that no positive law was shown to forbid the giving effect to such agreement. The law in India does not enable a purchaser of land to look only to the apparent title in the Collector's books, or the presumed title of the owner in possession; and it is beyond the province of a Court of Justice to give effect to the title of such a purchaser to the extent of defeating a prior lien or charge. The owner of property subject to a lien or charge can in general convey to another no title higher or more free than his own; it lies always on a succeeding owner to make out a case to defeat such prior charge.

Conceding that a purchaser for value, *bonâ fide*, and without notice of the charge would have an equity superior to A's right,—*Held* that a purchase in good faith by C had not been proved. If the English doctrine on this subject be adopted, as the rule prescribed by justice, equity, and good conscience, its qualifications and restrictions should not be rejected. (*f*)

A mortgagee who has intentionally represented to an intending purchaser of the mortgaged property, that he has no mortgage over it, and thereby induced him under that belief, to buy, cannot as against such purchaser subsequently enforce his mortgage. (*g*) See also persons standing by and allowing others to purchase property on which they have a lien, which upon enquiry they do not disclose, as unencumbered property, cannot assert their lien. (*h*)

trade and commerce. See *Jivandas Kesharji v. Framji Nanabhai*, 7 Bom' H. C. Rep. O. C. J. 45. [Marsh, 461.]

(*f*) *Varden Seth Sam v. Luckpathy Royjee Lallah*, 9 M. I. A., 303;

(*g*) *Munno Lal v. Lalla Ohoones Lal*, 21 W. R., (P.C.) 21; L. R. 11 A.

(*h*) 2 N. W. P. H. C. Rep., 315. [144.]

(B)—ANNUITIES, RENT-CHARGES &C.

The registration of a decree or order of any Court of Justice affecting immovable property is not compulsory but optional. But any person entitled to a claim or charge under such decree or order should not omit to have it registered in due course, inasmuch as his omission to do so may launch him into litigation with a honest purchaser for value, although it will never jeopardize his own interest. Nevertheless a prudent purchaser should always enquire as to whether there is any rent-charge, annuity or other lien affecting the property sought to be sold. (i)

Where immovable property of one person is by act of parties or operation of law made security for the payment of money to another, and the transaction does not amount to a mortgage, the latter person is said to have a charge on the property. (j)

Where one of several mortgagors redeems the mortgaged property and obtains possession thereof, he has a charge on the share of each of the other co-mortgagors in the property for his proportion of the expences properly incurred in so redeeming and obtaining possession. (k)

The trustee has a charge or lien on the trust-property in his hands for out-of-pocket expences properly incurred by him in the execution of his trust. (l)

The Transfer of Property Act, sec. 101 enacts that where the owner of a charge or other incumbrance on immovable property is or becomes absolutely entitled to that property, the charge or incumbrance shall be extinguished, unless he declares, by express words or necessary implication, that it shall continue to subsist, or such continuance would be for his benefit. (m) A mortgagee purchasing the equity of redemption may indicate his intention to keep his charge upon the property alive otherwise than by express words.

(i) Act III of 1877 (amended by Act XII of 1879), sec. 17, cl. (4)

(j) Act IV of 1882, sec. 100.

(k) *Ibid*, sec. 95.

(l) Agnew's Law of Trusts in British India, p. 215.

(m) Act IV of 1882, sec. 101. See *Mulchand Kuber v. Lallu Trikam*, L. L. B., 6 Bom. 404.

(c)—ATTACHMENTS UNDER ORDER OF COURT.

The law only forbids transfer of property after it has been attached, and not the sale of it before attachment. (n)

A sale or mortgage, if real, though made for the purpose of defeating an intended or probable execution, is valid against the execution-creditor. But if it be only a colourable transaction, not intended to confer upon the vendee or mortgagee any beneficial interest in the property, but simply to substitute such vendee or mortgagee as a *nominal* owner in lieu of the *real* owner (the judgment debtor) with the object of saving the property from execution, the vendee or mortgagee is a mere trustee, and the judgment creditor is entitled to attach and sell the property. (o)

T sold a mouza, of which he was owner, to Z. At the time of sale, the mouza was under attachment in execution of a decree obtained against T by R. Z paid the amount of that decree to prevent the property which she had purchased being sold in execution. Z was under no obligation otherwise to pay the amount of the decree. It was held (by Peacock, C. J. and Dwarkanath Mitter, J.) that Z was entitled to recover against T the amount so paid. (p) In this case, if Z had taken the precaution to enquire, he could have found out the attachment and avoided the risk, anxiety and trouble of a law-suit by abandoning the bargain.

(d)—PARAMOUNT CHARGES.

It has been repeatedly decided by the High Courts of India in accordance with the various legislative enactments relating to the realisation of state-demand upon land that Government revenue being a paramount charge on the land, it adheres to the land and to every portion of it independently of the hands into which it passes, or the subordinate rights that may have been created by the occupant out of his own qualified proprietorship. (q)

(n) *Per PHEAR, J.*, in *Ram Burun Singh v. Jankee Sahoo*, 22 W. R., 473.

(o) *Tilak Chand v. Jitmul*, 10 Bom. H. C. R., 206. See *ante* p. 84.

(p) *Zakuran v. Taylor*, 2 B. L. R., A. C. 86.

(q) *Gundoo v. Mardan*, 10 Bom. H. C. Rep. 419.

B, the owner of a fractional share in a joint mahal, mortgaged her share to A. A obtained a decree on her mortgage, and attached B's share in the estate, and afterwards purchased the same at the execution-sale. Whilst her share was under attachment, B stopped paying the Government revenue, whereupon the plaintiff, a co-sharer in the estate paid the whole revenue in order to save the mahal from sale. In a suit brought against A and B for recovery of the sum paid by the plaintiff on behalf of B's share, it was held, that the plaintiff was entitled to have the sum so paid declared to be a charge upon the share of B, which had been transferred to A, but not to a personal decree against A. (r)

A suit for the recovery of Government revenue, which the defendant was bound to pay, but which has been paid by the plaintiff to save the whole estate from sale, where the plaintiff asks to have the amount so paid made a charge on the portion for which he paid it, is governed by art. 132, and not by art. 99 of Act XV of 1877. (s) Mr. Justice Romesh Chunder Mitter in delivering the judgment of the Court said : "We think art. 99 has no application to the case, the plaintiff having paid the money, neither under a decree nor as a joint proprietor of the estate. The plaintiff is undoubtedly entitled to recover the money under sec. 9, of Act XI of 1859, and he might also, under that section, have retained his lien on the other mouzas of the estate till his money had been paid. He is equally entitled to recover his money under sec. 69 of the Contract Act, and we think that the liability to pay the revenue was not merely a personal liability of the defendant but was also a liability imposed upon the defendant's estate." (t)

The correctness of these decisions have been questioned by Mr. Justice Pontifex who was of opinion that they "enunciate

(r) *Syed Enayet Hossein v. Mudden Monee Shakhon*, 14 B. L. R., 155. See *Nagendro Chunder Ghose v. S. M. Kamini Dossee*, 11 M. I. A., 241.

(s) *Ram Dutt Singh v. Horakh Narain Singh*, I. L. R. 6 Cal., 549.

(t) *Mathuranath Chattopadhyaya v. Kristo Kumar Ghose*, I. L. R., 4 Cal., 369.

what at the first blush seems an attractive and catching equity, but it is difficult to see on what foundation such an equity could rest." No doubt under sec. 9 of Act XI of 1859, the co-sharer is entitled to recover from the defaulting proprietor personally. It will be seen, however, that the payment of Government revenue is a charge upon land and on every portion of it; and a co-sharer being in possession of such land is entitled to a lien for the amount advanced by him to avert a sale thereof by the Paramount Power. It is but fair and reasonable that a man should not be made to suffer for the default of his co-sharer and that he should have some security in law for a payment reluctantly made by him, which if not made would jeopardise and prejudice his own interest in the property. By the common law of the Empire the burden of the revenue falls on the land, and all land in British India is taken to be hypothecated to the Sovereign Power for the realisation of its revenue. The law, therefore, recognises Government revenue to be a primary charge on land and there is no reason why a person who pays for his co-sharer should not *pro tanto* avail himself of the charge.

"The liability to pay revenue due to Government," said Mr. Justice Markby, "is not a personal liability of the zamindar, but a liability which is imposed upon the zamindar's land. It is therefore, clear that section 69 of Act IX of 1872 was intended to include cases not only of personal liability, but all liabilities to payment for which owners of land are indirectly liable, those liabilities being imposed upon lands held by them. It was no doubt also intended to include such a case as a sub-lessee paying rent to the superior landlord for which the intermediate lessee was liable under a covenant." (v)

Chowkidari or police-tax, road-cess, and other cesses and state-demands upon land are also paramount burdens which ought always to be taken notice of by an intending purchaser.

(u) *Kisto Mohini Dossce v. Kaliprosanno Ghose*, I. L. R., 8 Cal., 419.

(v) *Mathuramath Chuttopadhyaya v. Kisto Kumar Ghose*, I. L. R. 4 Cal. 369; See also *Pisiruddin v. Madhushuden Pal Chowdhery*, B. L. R. Sup. Vol. 7b—108; *Mahomed Akil v. Asadunnissa Bibee*, B. L. R. Sup. Vol. 714—300; *Chowdhraim v. Chowdhraim*, S. D. A. 1859, 515.

(E)—*LIS PENDENS*.

The doctrine of *lis pendens* holds as to voluntary sales, and does not, as a rule, apply when the property is sold by a power paramount. (w) It applies, however, to execution sales and a purchaser under an execution is bound by a *lis pendens*. (x)

Every man is presumed to be attentive to what passes in the Courts of Justice or the State or Sovereignty where he resides ; and therefore a purchase made of property actually in litigation *pendente lite*, though for a valuable consideration, and without any express or implied notice in point of fact, affects the purchaser in the same way as if he had such notice ; and he will accordingly be bound by the judgment or decree in the suit. (y) The doctrine of *lis pendens*, however, rests not upon the principle of constructive notice, but upon the fact that it would be plainly impossible that any action or suit could be brought to a successful termination, if alienations *pendente lite* were permitted to prevail. This reason for refusing recognition to an alienation *pendente lite* made by a party to a suit is as fully applicable and as true in the case of a registered as of an unregistered conveyance. (z)

"The rule of *lis pendens* is," said Mr Justice Wells in *Shaw v. Chatterjee*, "that a purchaser *pendente lite*, is bound by the decree made against the person from whom he purchases. (a) Ordinarily, it is true, the decree of a Court binds only the parties and their privies in representation or estate. But he who purchases, during the pendency of a suit, is held bound by the decree that may be made against the person from whom he derives title. The effect of the maxim, *pendente lite nihil innovetur*, is not to annul the conveyance, but only to render it subservient to the rights of the parties in the litigation. As to

(w) *Per* PONTIFEX, J., *Kisto Mohini Dossee v. Kaliprosomno Ghose*, I. L. R. 8 Cal., 419.

(x) *Rajkissen Mukerji v. Radhamadhub Haldar*, 21 W. R. 349 ; *Lala Kali Prosad v. Bal Singh*, I. L. R. 4 Cal. 789.

(y) STORY'S Equity Jurisprudence, sec. 405.

(z) *Lakshmandas Sarup Chand v. Dnsrat*, I L. R., 6 Bom. 169—70.

(a) *The Bishop of Winchester v. Paine*, 11 Ves. 194.

rights of these parties the conveyance is treated as if it never had any existence, and it does not vary them." (b)

By the rule of *lis pendens*, a decree pending a suit is not to be got rid of by a sale by one of the parties while the suit is pending. (c)

If a purchase is made by a party to the suit of property in litigation while such litigation is actually going on, the purchaser is affected in the same manner as if he had notice of the dispute, though in point of fact he had no express notice or actual knowledge of the circumstances. (d) A sale or mortgage *pendente lite* is invalid against the plaintiff in a pending suit, and the vendor or mortgagor is under a disability to give any valid possession as against the plaintiff, to the party who becomes a purchaser or mortgagee during the pendency of the suit, whether or not the purchaser or mortgagee *pendente lite* has knowledge of the prior sale or mortgage as to which the litigation is pending, or of the litigation itself. (e) A grantee or vendee from the defendant, becoming such during the pendency of the suit, need not be made a party to the suit. (f)

The doctrine of *lis pendens* is in force and has a wider operation in British India than in England. In England, the doctrine has a narrower operation; for there *lis pendens*, unless registered, would not bind a purchaser or mortgagee with express notice, 2 Vic. cap. II. sec. 7. (g)

A purchaser should, therefore, invariably enquire whether there is any litigation pending relating to the property he intends to buy. He should avoid putting himself in the unenviable position of a purchaser *pendente lite*.

(b) *Per* WELLS, J. in *Kusum Shaw v. Unnodapersad Chatterjee*, 1 Hyde's Rep., 160. See sec. 52, Act IV of 1882

(c) *Fuzeehun Bibee v. Omdah Bibee*, 10 W. R., 469; 11 B. L. R., 60 note.

(d) *Digumburee Debta v. Ishan Chunder Sin*, 15 S. W. R., 372; See also STORY'S Equity Jurisprudence sec. 405.

(e) *Balaji Ganesh v. Anshajji*, 11 Bom. H. C. Rep., 24.

(f) *Gulab Chand Munick Chand v. Dhondi Valad Bhan*, 11 Bom. H. C. Rep., 64.

(g) *Shaw v. Chatterjee*, 1 Hyde, 167, S. C. *Laksmandas Sarup Chand v. Dastur*, 1 L. R., 6 Bom. 169—70 (F. B.); *Gulab Chand Munick Chand v. Dhondi Valad Bhan*, 11 Bom. H. C. R. 64; *Koylash Chunder Ghose v. Fool Chand Joharri*, 8 B. L. R., 478.

Section 4.—Duty of Vendors.

Prima facie and presumptively, a person under no disability, who has full knowledge of facts from which rights of property arise or accrue to that person, ought to be deemed to be aware of those rights. (*h*)

If the vendor is a lessee or assignee holding under a lease which contains a covenant not to assign without the lessor's consent, it is incumbent on him and not on a purchaser to obtain the lessor's licence, unless otherwise expressed in the contract (*i*)

It is the duty of the seller* distinctly to state what he is going to sell, and upon what conditions ; whenever therefore

(*h*) *Per* KNIGHT BRUCE, L. J.

(*v*) *Lloyd v. Crispe*, 5 Taunt 249 ; *Mason v. Carter*, 7 Taunt, 9.

* The Transfer of Property Act, section 55, paragraph(1) provides that in the absence of a contract to the contrary, the seller is bound—

Vendor's duties under Act IV of 1932.

(*a*) to disclose to the buyer any material defect in the property of which the seller is, and the buyer is not aware, and which the buyer could not with *ordinary care* discover ;

(*b*) to produce to the buyer on his request for examination all documents of title relating to the property which are in the seller's possession or power ;

(*c*) to answer to the best of his information all relevant questions put to him by the buyer in respect to the property or the title thereto ;

(*d*) on payment or tender of the amount due in respect of the price, to execute a proper conveyance of the property when the buyer tenders it to him for execution at a proper time and place ;

(*e*) between the date of the contract of sale and the delivery of the property, to take as much care of the property and all documents of title relating thereto which are in his possession, as an owner of ordinary prudence would take of such property and documents ;

(*f*) to give, on being so required, the buyer, or such person as he directs, such possession of the property as its nature admits ;

(*g*) to pay all public charges and rent accrued due in respect of the property up to the date of the sale, the interest of all incumbrances on such property due on such date, and, except where the property is sold subject to incumbrances, to discharge all incumbrances on the property then existing.

the terms are dubious, they are always to be interpreted against him. His duties also consist in the delivery, and the warranty of the estate or interest sold. (j)

Where the estate sold is tenanted, and there is anything in the nature of the tenancies which affects it, the vendor is bound to tell the purchaser, and to let him know what it is which is being sold; and the vendor cannot afterwards say to the purchaser, "If you had gone to the tenant and inquired you would have found out all about it." Such facts are within the vendor's especial knowledge; and the law, therefore, casts upon him the duty of disclosure. (k)

Generally speaking, a sale *with all faults* is binding, and the seller is not bound to disclose faults within his knowledge, which the purchaser may with "ordinary care" discover, although the seller must not industriously conceal them.

Lord St. Leonards in speaking of the conduct and duty of an intending vendor thus states the law on the subject in epistolary language:—If the person to whom you sell was aware of all the defects in the estate, of course he cannot impute bad faith to you in not repeating to him what he already knew, neither will you be liable if you were yourself ignorant of the state of the property. And even if the purchaser was at the time of the contract ignorant of the defects, and you were acquainted with them, and did not disclose your knowledge to him, yet he will be without a remedy if the defects were such as might have been discovered by a vigilant man.

If, however, you should, during the treaty, industriously prevent the purchaser from seeing a defect which ^{What truths you must disclose,} might otherwise have easily been discovered;—for example, if you carefully conceal a defect in a main wall by plastering and papering it over—the contract would not bind the purchaser. So if there is a *latent* defect in your estate, of which you are aware, and which the purchaser could not by any means

(j) Act IV. of 1882, sec. 55 para. (1) cl. (f), and para. (2).

(k) *Per* JAMES, L. J. in *Caballero v. Unity*, L. R., 9 Chan. 447. When any fact is specially within the knowledge of any person, the burden of proving that fact is upon him. Act I of 1872, sec. 106.

discover, you are bound to disclose it to him, although you should sell the estate expressly subject to all its faults.

If you misdescribe the estate in the particulars of sale or agreement with a fraudulent intent, it is unimportant that you expressly stipulated that an error in the description of it should not annul the sale. But although you misrepresent the nature of the property, yet the purchaser cannot be relieved, if he bought with full knowledge of the actual state thereof. (1) You must disclose any right of sporting over the estate, or any right of common over it, or any right to dig for mines upon it, or any liability as to widow's maintenance or the like.

If you should affirm that the property was valued by persons of judgment at a greater price than it was actually worth, and the purchaser act upon such misrepresentation, you could not enforce the contract in equity. Nor can you with impunity mis-state the quantum of rent paid for the property, because that is a circumstance within your *own* knowledge : the purchaser may have no other source of information ; or your tenants, if he were to apply to them, might combine with you, and so misinform and cheat him. And the purchaser will have a remedy against you for the fraud, although he did not depend upon your statement but enquired further.

If your agent should be guilty of a fraudulent representation, or a fraudulent concealment, you would be liable, although you were free from blame.

In the first place, you may falsely praise, or puff your property. *Simplex commendatio non nocet*. So <sup>What false-
hoods you may
utter.</sup> you may affirm the property to be of any value which you choose to name, for it is deemed a purchaser's own folly to credit a bare assertion like this. Besides, value consists in judgment and estimation in which many men differ.

Again, you may, with impunity, describe your land as uncommonly rich water-meadow, although it is imperfectly watered. So a mere puff as to the site, condition or quality of the property to be sold is entitled to no weight ; but you must

(1) *Gangadhar Sirkar v. Kastnath Biswas*, 9 B. L. R., 141.

not in answer to inquiries assert, contrary to the fact that your house is *not* damp.

An agent to sell or to buy an estate may be appointed by parol, that is, without writing; but you will not act prudently if you do not specify in writing to your agent the terms upon which you propose to sell or buy. The authority to sell does not include a power to receive the purchase-money, which therefore should *never* be paid to an agent without an express authority from the seller. Even an auctioneer to whom, by the conditions of sale, the deposit is to be paid, has no authority to receive any further part of the purchase-money. (m)

Where the vendor is not in possession, it lies on him to prove his title to the satisfaction of the purchaser, for not being in possession the vendor could not recover against the trespassers without proving a superior title. "Possession," said Sir Barnes Peacock in *Clarke v. Brindaban C. Sirkar*, "is evidence of title, and gives a good title as against a wrong-doer; but a person who has not had possession cannot, without proof of title, turn another out of possession, even though the other may have *no* title; for possession is a good title against every one who cannot prove a better." (n)

Although when parties do not possess a title prior to a particular date, they may fairly make it a condition that no title prior to that date shall be required, it is not fair or honest to say that the title commences on a certain date when it does not commence then, and when the vendor has prior deeds in his hands which show his title to be bad. (o)

Where a contract for purchase provides that possession shall be given by a certain day, the word "possession" must be understood to mean possession with a good title shown by the vendor. (p)

(m) Sugden's Handy-Book of P. L. 7th Ed. p. 23.

(n) Marsh., 75; S. C. W. R., F. B. 20; Ind. Jur., O. S. 97.

(o) *Dwarkanath Bysack v. Dinobundoo Mullick*, 18 W. R., (O. J.) 305.

(p) *Tilley v. Thomas*, L. R. 3, Ch. 61.

Section 5.—Duty of Purchasers

If a purchaser neglect to look into the title, it will be considered as his own folly, and he can have no relief. It has even been laid down, that if one sells another's estate without covenant or warranty for the enjoyment, it is at the peril of him who buys, because he might have looked into the title, and there is no reason he should have an action by the law where he did not provide for himself. (q) Under the Transfer Property Act, however, there is an implied warranty of title in every sale.

If a person purchases an estate which he knows to be in the occupation of another than the vendor, he is bound by all the equities which the party in such occupation may have in the land, for possession is *prima facie* evidence of a soisin-in-fee. (r) The duty to make enquiry arises from the fact that the estate is not in the actual possession of the vendor, which is sufficient to put an intending purchaser or mortgagee upon inquiry. (s) Where, therefore, a person purchases an estate in the possession of a tenant, he is bound to enquire into the title of such tenant, and if he neglects to do so, he takes subject to such rights as the tenant may have. The equities are the same where there is a person in possession as the object of a charitable trust and under the trust.

The vendee of zamindary rights cannot enforce against under-tenants any rights waived by the vendor, and it is therefore incumbent on the vendee to see that he does not become a loser by any act or omission of his vendor. (t)

The purchaser of a zamindari should always inspect the rent roll thereof and carefully examine the jama-wasil-bâki papers. The gross rental on paper of a zamindari is no sure criterion of the actual receipts from such zamindari.

(q) Sugden's V. & P., 11th Ed., p. 422. See however, Act IV of 1882 sec. 55 para 2.

(r) *Per* WIGRAM, V. C., in *Jones v. Smith* 1 Hare, 60.

(s) *Per* COUCH, J., in *Mancherjee Sorabji Ohulla v. Kongseoo*, 6 Bom. H. C. Rep. O. C., 26-27. See *ante* footnote (i).

(t) *Jogul Kishore Roy v. Khaja Ashanoollah*, 4 W. R., Act X R., 6.

If people are so unwise as to include purchases of different properties from different owners in one deed of sale, they run the risk of having their title in all the properties comprised therein shaken, should the genuineness of their purchase as to one of those properties be called in question in a regular suit. A purchaser, therefore, should always get separate conveyances executed where he purchases different properties from different owners. (u)

Defects that are in themselves patent to ordinary observation will not be a cause of action against the vendor. A right of way is not a *latent* defect but a *patent* one, and ought to be enquired into by the purchaser. It is the duty of the purchaser before he enters into a contract to view and inspect the property which he intends to buy, for "the mere name of the place where the property is situate may mislead him."

Although a vendor is bound to tell the purchaser of *latent* defects, yet a purchaser is not bound to inform the vendor of any *latent advantage* in the estate. Concealment of advantages by purchaser. If you were to discover that there was a mine on an estate for which you were in treaty, you would not be bound to disclose that circumstance to the vendor, although you knew he was ignorant of it. (v) But the rule is otherwise in respect to a purchaser who *was* or *is* in some position of trust or active confidence in relation to his vendor.

Under the Transfer of Property Act 1882,* the buyer of immovable property is bound to disclose to the seller any fact

(u) *Per* LOCH, J., in *Rui Sma Beebe v. Kunee Meah*, 8 W. R., 483.

(v) LORD St. LEONARDS' Handy-book of P. L. 7th Ed p 30.

* The Transfer of Property Act section 55, paragraph 5 provides that in the absence of a contract to the contrary the purchaser's duties under Act of 1882. buyer is bound—

(a) to disclose to the seller any fact as to the nature or extent of the seller's interest in the property of which the buyer is aware, but of which he has reason to believe that the seller is not aware, and which materially increases the value of such interest ;
(b) to pay or tender, at the time and place of completing the sale, the purchase-money to the seller or such person as he directs :

as to the nature or extent of the seller's interest in the property of which the buyer is aware, but of which he has reason to believe that the seller is not aware, and which materially increases the value of such interest. (w) An omission to make the disclosure is declared to be fraudulent. (v) The object of the Legislature in enacting these clauses is to enforce *uberimma fides* on the part of the purchaser, especially in cases where he has acquired special knowledge of the subject of sale while acting as agent, manager, guardian, or in some other fiduciary capacity for the benefit of his vendor.

A purchaser need not adhere closely to truth in procuring the estate at as cheap a price as he can. He may misrepresent the seller's chance of sale, and the probability of his getting a better price for his property than what he himself offers. But a purchaser is always in danger who makes an actual misrepresentation which tends to *mislead* the vendor, and he must disclose a fact which increases the vendor's interest, *e. g.*, the actual or imminent death of a life tenant. (y)

Whoever buys with notice of a lease is held to have knowledge of all its contents. In buying a leasehold estate, it is absolutely necessary to know the contents of the lease, particularly the covenants on the tenant's part.

provided that, where the property is sold free from incumbrances, the buyer may retain out of the purchase-money the amount of any incumbrances on the property existing at the date of the sale, and shall pay the amount so retained to the persons entitled thereto ;

(c) where the ownership of the property has passed to the buyer, to bear any loss arising from the destruction, injury or decrease in value of the property not caused by the seller ;

(d) where the ownership of the property has passed to the buyer, as between himself and the seller, to pay all public charges and rent which may become payable in respect of the property, the principal moneys due on any incumbrances subject to which the property is sold, and the interest thereon afterwards accruing due.

(w) Act IV of 1882, Sec. 55, cl. 5 (a).

(x) *Ibid*, sec. 55, cl. 6 (b).

(y) LORD ST. LEONARDS' Handy-book of P. L., 7th Ed. p. 30.

Where difficulties arise in making out a good title, the purchaser should not take possession of the estate until every obstacle is removed, for his taking possession may be construed to an acceptance of the title such as it is.

"If you and another," says Lord St. Leonards, "are in treaty for the purchase of an estate, and you agree to desist, and permit him to go on with the intended purchase upon his promising to let you have a part of the estate, you should require a written agreement from him; for although he should get the estate, he would not be bound by a mere parol or verbal agreement to convey part of it to you." (z)

In a case of purchase after a decree, where the vendor is only a *bona fide* owner, and the vendor's husband (supposed to be the real owner) wrote the deed and received the purchase money (thereby making himself a consenting party) the *onus* lies on the plaintiff to prove that he is a *bona fide* purchaser for value, exercising due care and diligence. (a)

An auction purchaser at a sale in execution is bound to satisfy himself of the value and quality of the thing sold, just as much as if he were purchasing the same under private contract. (b)

As a general rule, the mere omission to pursue inquiries to the extent to which a *prudent, cautious* and *wary* person would ordinarily extend them, is not, on itself, sufficient to fix a *bona fide* purchaser with notice of what he might have ascertained by pursuing such inquiries. The fact of the conveyance being in consideration of a pre-existing debt, would, of course, induce a doubt whether the purchaser were acting *bona fide*; and it has been held that the omission to inquire after the title-deeds of a property must be attributed to a suspicion that the enquiry if made would lead to disclosures affecting the title. (c)

(z) LORD ST. LEONARDS' Handy-book of P. L., 7th Ed. p. 41. See *Bharrub Chunder Sin v. Anand Moyee Chowdhraia*, 1 Marsh., 494.

(a) *Man Turunginee Dabee v. Boistub Ohurun Bhudder*, 1 W. R., 110.

(b) *Jummal Ali v. Turbee Lall Doss*, 12 W. R., 41.

(c) *Dart on V. & P.* 5th Ed. p. 877. Act IV of 1882, sec. 55 para 1, cl. (a) requires only "ordinary care" on the purchaser's part.

Mortgagor buys
mortgagee's interest
mortgagee can
not defeat mortgagor's
incumbrances.

If the mortgagor purchase from his first mortgagee selling under his power of sale, he takes the property subject to any subsequent incumbrances which he himself may have created.

Where property is sold by Government for general debts, and not for arrears of revenue, they sell only the right, title and interest of the debtor, and do not guarantee the vendee a title. (*d*)

A purchaser is bound to satisfy himself as to the jurisdiction of the Court to order a sale, and this obligation continues until the sale is complete. Before he applies to the Court to confirm the sale, and grant him a certificate, the purchaser ought to ascertain that the decree under which the sale was ordered is still in existence. If a decree be reversed after a sale under it has become absolute, and a certificate has been granted to the purchaser, the title of the purchaser is not affected by the reversal of the decree.

The plaintiff's title to the land in dispute was derived from a purchaser at a Court's sale. The decree under which the sale took place was reversed in appeal. The reversal took place subsequently to the sale, but before the order was made confirming the sale. It was held by the Bombay High Court that from the moment the decree was reversed the Court ceased to have jurisdiction to take any further steps to execute it. Though the Court, when it confirmed the sale, was probably not informed that its decree had been reversed, and the purchaser was probably ignorant of it, yet the act of the Court, in completing the sale after such reversal, was none the less without jurisdiction, and being without jurisdiction, could confer no title. (*e*)

It is the practice of the Courts in India not to give possession under a judicial sale by removing the possession of one who is in possession under an apparent *bona fide* title. If the judgment-debtor can assert his title to possession by suit only, the new owner of his title can have no higher claim. The Court therefore leaves the purchaser to assert his title by a regular

(*d*) *Douglas v. Collector of Benares*, 5 M. L. A. 217; S. P. C. J., 231.

(*e*) *Basappa Malappa v. Dhundya Sherlingya*, I. L. R. 2 Bom. 540.

suit. The purchaser at an execution sale of the right title, and interest of a judgment-debtor, should therefore always satisfy himself that such judgment-debtor is in sole possession. Where the judgment-debtor is not in possession, or is a mere co-parcener in the property sold, the purchaser of his right, title and interest must take upon himself the burden of a suit for possession. (f)

Whenever a purchaser wishes to buy a property, the title whereof is partially defective, it is always safer for him to insist upon and obtain an indemnity-bond from his vendor by way of collateral security for the title. In the Presidency-towns it is customary with solicitors to advise such a precaution whenever they find some flaw or taint of fraud in the title.

When it is provided by conditions of sale of land that the vendor shall not be bound to show any title prior to an instrument of a certain date, the purchaser may insist upon a defect of title appearing *aliunde* and before that date, and if it be proved to exist, may rescind the contract and recover back earnest-money, interest and expences. (g)

The fact of A obtaining a declaration of his lien upon certain property for an amount of debt, is no bar to B's attaching and selling that property, but the purchaser will be bound by that lien. (h)

The circumstances, which should prompt inquiry to an intending purchaser may be infinitely varied ; but without laying down any general rule, it may be said that they must be of such a specific character that the Court can place its finger upon them, and say that upon such facts, some particular inquiry ought to have been made. (i) Benâmi ownership, absence of title-deeds, catching conditions as to title, and want of possession in the vendor are facts sufficient to put a purchaser upon inquiry.

(f) *Tarakant Banerjee v. Puddomoney Dossee*, 10 M. L. A. 746 ; 5 W. R., P. C., 63.

(g) *Muncherjee Pestonjee v. Narayan Euzmonjee*, 1 Bom. H.C. Rep. 77.

(h) In the matter of *Manohur Paul v. Wise*, 15 W. R. 246.

(i) *Raj Coomarr Koondoo v. McQueen*, 11 B. L. R., 54 (P. C.)

Section 6.—Slander of Title.

Where a person falsely and maliciously makes a statement in an auction room or elsewhere that the vendor's title is defective, whereby such vendor is damnified, the tort thus committed is called "a slander of the owner's title." It may be oral, in writing or in print. The words spoken or the statement made must go to defeat the vendor's title, and there must be malice, either express or implied. "Slander of title," said Maule, J., "ordinarily means a statement of something tending to cut down the extent of title, which is injurious only if it is false. It is essential to give a cause of action that the statement should be *false* and *malicious* with intent to injure the plaintiff. If the statement be true—if there really be the infirmity of title that is suggested, no action will lie, however malicious the defendant's intention might be." (j)

If the words are spoken by a *stranger*, who has no right or business to interfere, the law presumes malice; and if he cannot show the truth of his assertion, he is responsible in damages: but if he is himself interested in the matter, and announces the defect of title *bonâ fide*, either for the purpose of protecting his own interest or preventing the commission of a fraud, the legal presumption of malice is rebutted, and the plaintiff must then show that there was no reasonable or probable ground for the statement.

If the alleged slanderer of title is himself interested, or has fair and reasonable ground for believing himself to be interested, in the sale or disposition of the property, the title whereof is alleged to be slandered, and has acted *bonâ fide*, though under the influence of prejudice or misconception, he is not responsible in damages unless it be shown that he must have known that there was not the slightest pretence for his interference. (k) Where, therefore, a Hindu reversioner, though remote and not immediate, gave notice of his expectancy in a certain property

(j) Addison on Torts, 3rd Edition, p. 801.

(k) *Ibid.*

by publishing a caution in the Exchange Gazette of Calcutta warning purchasers from buying the same, it was held that in the absence of malice, the vendors could not recover damages against him. (l)

Where a person claims a right in himself which he intends to force against a purchaser, he is entitled, and in common fairness bound, to give the intending purchaser warning of his intention; and no action lies for giving such preliminary warning, unless it can be shown, either that the threat was made *malâ fide*, only with the intent to injure the vendor, and without any purpose to follow it up by an action against the purchaser, or that the circumstances were such as to make the bringing an action altogether wrongful. (m)

A suit for slander of the vendor's title, therefore, will not lie against a person for giving notice of his claim upon an estate, either by himself or his attorney, at a public auction, or to any person about to buy the estate, although the sale be thereby prevented; and to sustain the action malice in the defendant, and damage to the plaintiff, must be proved. (n) In any case, in order to support a suit for slander of title, the plaintiff must prove falsehood, malice and special damage. (o) Suits for slander of title are very rare in India and as far as the author is aware there is not a single reported Indian decision on the subject.

In an action for slander of title special damage must be proved. This damage may consist in the property having on a sale fetched a less price than it otherwise would, or in the owner being put to unnecessary expences in consequence. Another essential ingredient, which will affect the measure of damages, is the presence of malice. (p) Mere mental pain and anxiety in the vendor, without a material damage cannot be valued by the law. (q)

(l) *Per* BROUGHTON, J., *Rajendra Narain Munshi v. Ras Oharun Pal*,

(m) *Wren v. Weild*, L. R. 4 Q. B., 730.

[suit No. of 1879, Q.C.J.]

(n) *Sugden's V. & P* 11th Ed., 423.

(o) *Dart on V. & P.* 4th, Ed 108.

(p) *Brook v. Raol*, L. R. 4 Exch., 524.

(q) *Lynch v Knight*, 9 H L C., 507.

CHAPTER IV. OF VARIOUS KINDS OF SALES.

Sales are either *voluntary* or *compulsory*. All voluntary sales of immovable property are effected either by private contract or by public auction.

The very nature of a sale by auction is that the property shall go to the highest real bidder. Each bidding is only an offer or proposal and there is no contract until some bid is accepted by the fall of the hammer, when there is a contract with an ascertained person, namely, the bidder to whom the lot is knocked down.

If, at a sale by auction, the seller makes use of pretended biddings to raise the price, the sale is voidable at the option of the buyer. (s) The secret employment by the owner of the property of a puffer or under-bidder, at a sale by auction of such property is a fraud upon *bonâ fide* bidders. * The owner cannot bid privately for his own property, and all secret dealing on the part of the seller is deemed fraudulent.

All judicial sales in execution of decrees and statutory sales for arrears of rent or revenue are compulsory in their character, for they are sales *in invitum* held by the paramount power against the will of the judgment-debtor and the defaulting proprietor, and as such require a strict compliance with the preliminary legal formalities prescribed by the Legislature as to proclamation, advertisement and notice to the proper parties. The maxim, *forma legalis forma essentialis*, applies with peculiar force to judicial and statutory sales; and any material irregularity or non-compliance with statutory provisions, whereby the judgment-debtor or the defaulting prior owner is prejudiced, will vitiate the sale *ab initio* and make it voidable at the instance of the party injured.

(s) The Indian Contract Act 1872 sec. 123.

* The basis of all dealings ought to be *good faith*. The practice of puffing is a fraud upon the sale and the public. I cannot listen to the

Section 1—Of Sales for Arrears of Government Revenue.

The general policy of the revenue sale-laws passed since the Permanent Settlement, has been to protect the public revenue by placing the purchaser of an estate sold for arrears of revenue in the position of the person who, at the time of the Decennial Settlement, engaged to pay the revenue then fixed. They, therefore gave, or sought to give, to the purchaser, the power of abrogating all engagements made by the defaulting zamindar or his predecessors since the settlement, whereby the zamindari rents and profits, which were the security to Government for the due payment of its revenue, were diminished. (t)

At a sale for default of payment of Government revenue, the Collector is bound to sell to the highest bidder, even though (as in this case) the bidder be the husband of the person in arrear. In a suit against the Collector personally, for damages on account of loss sustained by the sale to the second highest bidder, the difference between the two bids is the proper measure of the plaintiff's loss and not the actual or probable value of the estate. (u)

In a suit by an auction-purchaser of a permanently settled estate to recover certain *jalkars* of which the defendants had been admittedly in possession for nearly fifty years, and which they claimed as incidents to a tenure which existed before the date of the Permanent Settlement, it was held that the *onus* was on the plaintiff to prove his title affirmatively. (v) Sir James Colville in delivering the judgment of the Judicial Committee in this case thus dwelt upon the first principles as to the

argument that it is a common practice. Gaming, stock-jobbing and swindling are all very common, but the law forbids them all. *Per* LORD MANSFIELD.

(t) *Per* SIR JAMES COLVILLE in *Khaja Assanoolah v. Obhoy Ohunder Roy*, 13 M. L. A., 317; 13 W. R., P. C., 24. Pandit's P. C. J., 527.

(u) *Per* PHEAR AND BAILEY J. J. in *Mr. Cornell v. Mt. Odooy Tara Chowdhraim*, 8 W. R., 372.

(v) *Forbes v. Meer Mahomed Hossein*, 12 B. L. R. (P. C.), 210.

status and rights of and auction-purchaser : " In the case of an auction-purchaser the cause of action must be taken to have first arisen at the date of the purchase, and consequently that the defendants cannot plead their long possession as an absolute bar to the suit. The statutory title, however, which the law gives to an auction-purchaser is that, for the protection of the revenue, and in order to ensure its due payment by him and to avoid the necessity of repeated sales of the property, he is remitted to all those rights which the original settler at the date of the perpetual settlement had ; and may, in consequence of that, sweep away or get rid of all the intermediate tenures and incumbrances created by preceding zemindars since that date. In the assertion of this right, the auction-purchaser is, no doubt, in many cases allowed to have the benefit of a certain presumption, and by virtue thereof to throw the burthen of proof on his opponent. That presumption, however, is founded not so much upon the principle which I have just mentioned, as upon the principle that every biga of land is bound to pay and contribute to the public revenue, (w) unless it can be brought within certain known and specified exceptions, and that the right of the Zamindar to enhance rent is also presumable until the contrary is shown. Accordingly, in many cases, which may be found in the books, a very heavy burden of proof has been placed upon the defendants, whose tenures have been questioned by auction-purchasers ; and they have had to prove, in circumstances of great difficulty, that their tenure did really exist at the date of the perpetual settlement, or even twelve years before, in order to escape the consequences of the claim.

" It is, however, to be observed that the course of modern legislation, and also of modern decision, has, if not in the case of lakhiraj lands, at least in the case of under-tenants, to a considerable degree modified the rules laid down in the earlier cases, by giving force to the contrary presumptions arising from proof of long and undisturbed possession. In the present case the respondents are almost admitted to have given proof of posses-

(w) See Preamble, Beng. Reg. XLIV. of 1793.

sion for a period of nearly fifty years. But, if they had not done so, this particular case would, in their Lordships' opinion, stand clear of the presumptions which the appellant invokes in his favor. For the respondents are claiming these *julkars*, or rights of fishery, as an incident to a tenure admitted to be incapable of being disturbed by the Zamindar—a tenure which existed before the date of the perpetual settlement. The question therefore resolves itself into one of parcel or no parcel,—whether the *julkars* are parcel of the old estate of the under-tenant, or whether they have been granted by an act of the Zamindar for the time being subsequent to the perpetual settlement. Therefore, it seems to their Lordships that there is nothing to relieve the appellant from the ordinary rule which the law imposes on a plaintiff, namely, that of establishing his own title affirmatively, and indeed of making out a strong title in order to disturb a possession of very long duration. Their Lordships are, therefore, of opinion that the Courts below were right in holding that the burden of proving that these *julkars* did form part of the assets upon which the settlement was made, and that his means of meeting the revenue had been diminished by the alienation of them by means of acts subsequent to the date of the perpetual settlement, lay upon the appellant."

In a sale for arrears of Government revenue the Government stands forth as the paramount vendor, and the purchaser is not privy in estate to the defaulting proprietor. He does not derive his title from him, and is bound neither by his acts nor by his laches, although he acquires the proprietary right of such defaulting owner by operation of law. (x)

A purchaser at an auction sale cannot, where lands are held

A purchaser at an auction sale for arrears cannot annul a hereditary *ghatwally* tenure.

under an hereditary *ghatwally* tenure originally created before the Decennial Settlement and at a fixed rent, resume those lands on the suggestion that the *ghatwally* services (guarding the passes)

are no longer required. The omission of words of inheritance does not show conclusively that a sanad is not hereditary; it

(r) *Moonshes Buzlool Rahman v. Purni Dhun Dutt*, 8 W. R., 222.

being shown that a *ghatwally* tenure had descended from father to son for several generations, it was held that it was an hereditary tenure. (y)

A purchaser at a sale for arrears of Government revenue is not entitled under Reg. XLIV. of 1793 to cancel a *ghatwally* tenure created subsequently to the permanent settlement. It is doubtful whether he would be entitled to enhance the rent. (z) Their Lordships of the Privy Council thus expressed their views on the subject :—" Assuming that the *ghatwally* tenure in question was created subsequently to the date of the Permanent Settlement, namely, in the year 1794, their Lordships are of opinion that the plaintiff would not as an auction-purchaser be entitled to turn the defendants out of possession, but that his only right, if any, would be to enhance the rent. The decision in the case of *Ranee Surnomoyee v. Sutteeschunder Roy* (a) was upheld in the case of the *Raja Satyasaran Ghosal v. Mohesh Chander Mitter*." (b)

In *Ranee Surnomoyee v. Sutteeschunder Roy* the zamindari was sold for arrears in 1843, and the Privy Council in dismissing a suit by the Zamindar for enhancement (nearly twenty-three times) of the original rent of a *talukdāri* tenure held at uniform rent for more than 60 years ruled (i) that the auction-purchaser, whose representative the Zamindar was, had an option to confirm the existing rate of rent, and must upon the evidence be taken to have exercised that option in favour of the defendant Talukdar; (ii) that upon a construction of the intent and policy of Bengal Reg. XLIV of 1793, the Government cannot be supposed to have intended a wanton and unjust disturbance of vested interests by a purchaser at a revenue-sale; (iii) that the existing interests of the Talukdar did not, *ipso facto*, cease to exist without any act done by the pur-

(y) *Kooldeesep Narain Singh v. The Government of India*, 14 M. I. A., 247. S. C. Pandit's P. C. J. Vol. II. 734; 11 B. L. R., 71.

(z) *Raja Lilanand Singh Bahadur v. Thakur Munorunjan Singh*, 13 B. L. R., P. C., 124.

(a) 10 M. I. A., 123. S. C. Pandit's P. C. J. Vol. II., 60. [420.

(b) 2 B. L. R., P. C., 23; 12 M. I. A., 263; Pandit's P. C. J. Vol. II.,

chaser at the Government sale in 1843; and (iv) that it was not the duty of the Judicial Committee to support a claim which was manifestly unjust, inasmuch as during the long period for which the property had been held at a small unvarying rent, it had been bought and sold, and changes and improvements had been made, no doubt at considerable expense, and upon the faith of the rent to the Zamindar remaining unchanged, and that the plaintiff himself having purchased while that state of things continued must be presumed to have purchased for a price calculated accordingly. Their Lordships thought it unnecessary to decide whether sec. 5* of Reg. XLIV was to be construed as giving a power only to the purchaser, or to him and his heirs, or a power attached to the zamindari which passed to subsequent purchasers. They were, however, of opinion, that a construction which would render the title to property uncertain, ought not to be given to a power of this description.

In *Raja Satyasaran Ghosal v. Mohesh Chunder Mitter*, the zamindari was sold for arrears of Government revenue under Reg. XI of 1822. The purchaser's representatives in interest sued to enhance the rent of an under-tenure, the hereditary and *istmarari* character whereof was legally presumed from evidence of "long and uninterrupted enjoyment, and of descent from father to son." It was held by the Judicial Committee following *Ranee Surnomoyee's* case :—

I. That the purchaser's representatives had no right to enhance.

II. That a sale for revenue cannot of itself merely, and without any act, proceeding or demonstration of will on the part of the purchaser, alter the character of an under-tenure.

III. That sec. 5, Reg. XLIV of 1793 declares the general principles upon which all subsequent legislation as to revenue

* Sec. V. Reg. XLIV., 1793, provides that when a *zamindari* is sold at a public sale for discharge of arrears due from the proprietors to the Government, "all engagements which such proprietors shall have contracted with dependent *Talukdars*, whose *Taluks* may be situated in the land sold, as also all leases to under-farmers and *Pottahs* to *Byots* (with the

sales has proceeded, namely, that of putting a purchaser at a sale for arrears of revenue in the position of the party with whom the permanent settlement was made.

. IV. That a suit for enhancement implies such a privity of title or tenure existing between the parties, that a claim to some rent is legally inferrible from it.

Their Lordships did not in this case deem it necessary to consider whether the stringent powers given by sec. 5 of Regulation XLIV of 1793 and ss. 30 and 33 of Regulation XI of 1822 (repealed by Act XII of 1841, and this again repealed by Act I of 1845 and Act XI of 1859) to purchasers, could in any case be exercised *eo nomine* by the heirs or assignees of such purchasers. "Justice and sound policy alike require", said Sir James Colville, "that inasmuch as the law has given those stringent powers for the particular purpose of enabling the purchaser again to make the income of the estate an adequate security for the public revenue assessed upon it, and the exercise of them cannot but occasion great hardship to under-tenants, and insecurity to property, they should be exercised within a *reasonable* time. And their Lordships believe that that object has now been in some measure secured by Acts X and XIV of 1859."

According to the decision of the Privy Council in the case of *Ranee Surnomoyee v. Maharaja Suttees-chunder Roy Bahadoor*, the right of an auction-purchaser under sec. 5 of Regulation 44 of 1793 is limited to raising the rent of a taluk created by the defaulter to what is demandable from it according to the *purguna* rates prevailing either at the time when the taluk is

Right of auction-purchaser to enhancement of Rent under Reg. 44 of 1793.

exception of the engagements, *Pottahs*, and leases specified in secs. VII. and VIII.,) shall stand cancelled from the day of sale, and the purchaser or purchasers of the lands shall be at liberty to collect from such dependent *Talukdars*, and from the *Byots* or cultivators of the lands let in farm, and the lands not farmed, whatever the former proprietor would have been entitled to demand according to the established usages and rates of the *Pergunnah* or District in which such lands may be situated had the engagements so cancelled never existed." And sec. VII of the same Regulation provides, that sec. V is not to authorize the assessment of any increase upon the lands of such dependent *Talukdars*, as were exempted from increase at the Decennial Settlement of 1793.

created or at the time when the auction-purchase takes place ; and he cannot demand any higher rent even if, at any subsequent time such higher rent be in accordance with the prevailing current rate. (c)

In a suit to avoid an under-tenure by the purchasers at an auction-sale for arrears of Government revenue, the defendants contended that the tenure was created prior to the Permanent Settlement and that some portion of the lands comprised in it were covered with permanent structures and improvements, and that, accordingly, it was protected under excepts. 1 and 4 to sec. 37* of Act XI of 1859 : but the lower Court gave a decree to the plaintiff and annulled the under-tenure. *Held*, by White J. that, notwithstanding a party may fail to show that his tenure was created prior to the Permanent Settlement, yet he is entitled to the benefit of the 4th exception in respect of any permanent structures that may be upon his holding. (d)

A person holding land, which is not protected from the operation of sec. 37 of Act XI of 1859 by any of Act XI of 1859 sec. 37, except 4. the first three exceptions, is yet entitled to the benefit of the fourth exception in respect of any of the items

(c) *Mohini Mohun Roy v. Ichamoyee Dossee*, I. L. R. 4 Cal., 612.

(d) *Bhago Bibee v. Ramkant Roy Chowdhery*, I. L. R. 3 Cal., 293.

* SEC. 37 OF ACT XI OF 1859.

XXXVII. The purchaser of an entire estate in the permanently settled Districts of Bengal, Behar, and Orissa, sold under this Act for the recovery of arrears due on account of the same, shall acquire the estate free from all encumbrances which may have been imposed upon it after the time of settlement ; and shall be entitled to avoid and annul all under-tenures and forthwith to eject all under-tenants, with the following exceptions :

First. Istemraree or Mokurreree tenures which have been held at a fixed rent from the time of the permanent settlement.

Secondly. Tenures existing at the time of settlement, which have not been held at a fixed rent. Provided always that the rents of such tenure shall be liable to enhancement under any law for the time being in force for the enhancement of the rent of such tenures.

Thirdly. Talookdaree and other similar tenures created since the time of settlement and held immediately of the proprietors of estates,

mentioned therein, which may have been established on the land ; and there is nothing in the words of the exception confining the benefit of it to tenure or under-tenure holders, and excluding the ryots from it.

The benefit of the fourth exception to sec. 37, Act XI of 1859 must be limited to improvements effected *bona fide* and to permanent buildings erected *before* the revenue-sales, and should not be conceded to anything subsequently constructed, or which appears to have been constructed merely for the purpose of defeating the rights of an auction-purchaser. Subject to this reservation, it does not matter whether the improvements have been effected by the present holder or by some previous owner.(c)

Any co-proprietor purchasing an estate sold for arrears of Government revenue, repurchases it subject to all incumbrances existing at the time of sale, even if the purchaser is a non-defaulting proprietor and the incumbrances were made by defaulting pro-

and farms for terms of years so held, when such tenures and farms have been duly registered under the provisions of this Act.

Fourthly. Leases of lands whereon dwelling houses, manufactories, or other permanent buildings have been erected, or whereon gardens, plantations, tanks, wells, canals, places of worship, or burning or burying grounds have been made, or wherein mines have been sunk.

And such a purchaser as is aforesaid shall be entitled to proceed in the manner prescribed by any law for the time being in force for the enhancement of the rent of any land coming within the fourth class of exceptions above made, if he can prove the same to have been held at what was originally an unfair rent, and if the same shall not have been held at a fixed rent, equal to the rent of good arable land, for a term exceeding twelve years ; but not otherwise.

Provided always that nothing in this Section contained shall be construed to entitle any such purchaser as aforesaid to eject any ryot, having a right of occupancy at a fixed rent or at a rent assessable according to fixed rules under the laws in force, or to enhance the rent of any such ryot otherwise than in the manner prescribed by such laws, or otherwise than the former proprietor, irrespectively of all engagements made since the time of settlement, may have been entitled to do.

(c) *Asgar Ali v. Asmat Ali*, I. L. R., 8 Cal., 110.

prietors.* Such co-proprietor so purchasing is in the same position whether he purchases benami through a third party, or purchases it from the third party after the latter had purchased it for himself. (f)

(f) *Mahomed Gaze Chowdhery v. Pearee Mohun Mookerjee*, 16 W. R., 136.

* SEC. 13, 14, 53 AND 54 OF ACT XI OF 59.

XIII. Whenever the Collector shall have ordered a separate account or accounts to be kept for one or more shares, ^{Sale of separate shares} if the estate shall become liable to sale for arrears of revenue, the Collector or other Officer as aforesaid in the first place shall put up to sale only that share or those shares of the estate from which, according to the separate accounts, an arrear of revenue may be due. In all such cases notice of the intention of excluding the share or shares from which no arrear is due, shall be given in the advertisement of sale prescribed in Section VI of this Act. The share or shares sold, together with the share or shares excluded from the sale, shall continue to constitute one integral estate, the share or shares sold being charged with the separate portion or the aggregate of the several separate portions of jumma assigned thereto.

XIV. If in any case of a sale held according to the provisions of the last preceding Section, the highest offer for the share exposed to sale shall not equal the amount of arrear due thereupon to the date of sale, the Collector or other Officer as aforesaid shall stop the sale, and shall declare that the entire estate will be put up to sale for arrears of Revenue at a future date, unless the other recorded sharer or sharers, or one or more of them, shall within ten days purchase the share in arrear by paying to Government the whole arrear due from such share. If such purchase be completed, the Collector or other Officer as aforesaid shall give such certificate and delivery of possession as are provided for in Sections XXVIII and XXIX of this Act, to the purchaser or purchasers, who shall have the same rights as if the share had been purchased by him or them at the sale. If no such purchase be made within ten days as aforesaid, the entire estate shall be sold, after notification for such period and publication in such manner as is prescribed in Section VI of this Act.

LIII. Excepting sharers in estates under hutwarrah who may have saved their shares from sale under Sections XXXIII and XXXIV Regulation XIX. 1814, and sharers with whom the Collector, under Sections X and XI of this Act, has opened separate accounts, any recorded or unrecorded proprietor or co-partner, who may purchase the estate of which he is proprietor or co-partner; or who by re-purchase or otherwise may

A in November 1862 purchased a portion of an estate sold on execution of a decree against their proprietor. This sale was not confirmed till the 9th February 1863. Default occurred in the payment of the Government revenue in January 1863, and the entire estate was put up for sale by the Collector, and purchased by A on the 29th March 1863. It was held that A at the time of his second purchase was an unrecorded co-partner of an estate within the meaning of sec. 53 of Act XI of 1859, and therefore took the entire estate subject to all the encumbrances existing at the time of the Government sale for arrears of Revenue. (i)

The proprietors of a joint Mehal, the jamâ of which had been partitioned under sec. 10, of Act XI of 1859, were in possession of specific shares under a private arrangement among themselves, but had not obtained separation of shares under sec. 11. One of the proprietors sold his share to the plaintiff, and the shares of two other proprietors who made default in payment of the revenue were sold under sec. 13, Act XI of 1859, and purchased by the defendants. In a suit for exclusive possession of the share purchased by the plaintiff, it was held that the defendants acquired by their purchase an interest in the property as

recover possession of the said estate, after it has been sold for arrears under this Act; and likewise any purchaser of an estate sold for arrears or demands other than those accruing upon itself; shall by such purchase acquire the estate *subject to all its encumbrances* existing at the time of sale and shall not acquire any rights in respect to under-tenants or ryots, which were not possessed by the previous proprietor at the time of the sale of the said estate.

LIV. When a share or shares of an estate may be sold under the provisions of Section XIII or Section XIV, the purchaser shall acquire the share or shares *subject to all encumbrances*, and shall not acquire any rights which were not possessed by the previous owner or owners.

(i) *Abdul Bari v. Ramdas Koondoo*, I, L. R., 4 Cal., 607.

an undivided estate, and the plaintiff was not entitled as against them to have exclusive possession of any specific share. (g)

Under section 53 of Act XI of 1859 a co-proprietor who purchases *benāmi* an estate at a sale for arrears of Government revenue, takes it subject to the subordinate taluki rights, *izara* or other incumbrances created by the defaulting proprietor. (h)

The sale of an estate for arrears of revenue where no such arrears exist, is null and void, even though it is regularly conducted, and the purchase is made *bonâ fide*. (i)

Section 26 of Act I of 1845, which enables auction-purchasers at sales for arrears of revenue to eject tenants in the province of Benares, is by sec. I of Act X of 1859, made subject to the modifications contained in the latter Act. Therefore, notwithstanding a sale by auction for arrears of revenue, a *mokurree* tenant in the province of Benares is entitled to receive a pottah at the fixed rent theretofore paid by him. (j)

The power of purchaser at a revenue sale to annul and avoid all incumbrances, is limited to purchasers of entire estates. (k)

The principle that the purchasers of estates at revenue sales acquire them free from all incumbrances and in fact in the same condition in which they were at the time of the Permanent Settlement, is equally recognized by Act XI of 1859 as by the laws previous to it. (l)

The object of sec. 5, Reg. XLIV of 1893 taken together with sec. 7 was *not* the destruction of the under-tenures upon the sale of the parent estate for arrears of Government revenue, but only to empower the purchaser at such sale to avoid the subsisting engagements as to rent, and to enhance the rent to the amount to which, according to the established usages and rates of the *purgunah* or district, it would have stood, had the cancelled engagement so avoided never existed. (m)

(g) *Gungadeen Misser v. Kheeroo Mundul*, 14 B. L. R., 170.

(h) *Mahomed Gazi Chowdhry v. J. G. Leicester*, 7 B. L. R., Ap. 52.

(i) *Sreenunt Lall Ghose, v. Shama Soondery Dassees*, 12 W. R., 276.

(j) *Munro v. Baluck Singh*, 1 N. W. R., Par. 8, p. 153.

(k) *Kalidass Ghose v. Chandra Mohini Dassees*, 8 W. R., 68.

(l) *Gohuck Money Dassees v. Hurro Ohunder Ghose*, 8 W. R., 62, 222.

(m) 2 W. R., F. C. 14; See also, 11 W. R., F. C. 10.

The purchaser at a revenue sale may get rid of a title created by adverse possession. (n)

Where land, in the possession of a mortgagee, is sold by the *mâmlatdâr* for arrears of Government land-revenue, it was held that as the land-revenue is a paramount charge on the land, whoever derives title from the occupant takes it subject to that charge, and that, therefore, the purchaser at the sale was entitled to the land, free from any mortgage lien. o)

Act XI of 1859 is to a great extent a remedial Act passed for the benefit of the subject, and in order to relax the stringency of former statutes, whereby the crown was empowered to sell estates for non-payment of revenue. Section 5 of the said Act applies to estates which are under attachment issued under the Civil Procedure Code, and which are in the hands of a Manager appointed on the application of the judgment-debtor for the purpose of liquidating the debts. Such attachments are not superseded by the appointment of a manager. The words "arrears of estates under attachment" apply to cases where a portion only of an estate is under attachment, as well as to cases in which the whole estate has been attached (p) "A creditor obtaining an attachment under the Civil Procedure Code," said the Privy Council, "had an inchoate interest in the land; his debtor could not alienate it, and no judgment creditor even if his judgment were prior, who obtained subsequent execution, would have any rights against him. It may be said that the estate was virtually in the custody of the law. That being so, the judgment-creditor had an obvious interest in knowing whether or not the revenue was paid; in other words in knowing whether or not the estate in which he had an interest was forfeited. It may well be that the Legislature may have thought that, under those circumstances, he was entitled to be informed whether the estate was or not liable to forfeiture, in order that he might step in, as he might under

(n) *Thakur Dass Roy Chowdhery v. Nobin Kissen Ghose*, 15 W. R., 552, *Narain Chunder Chowdhery v. Tayler*, 3 Calc. L. R. 151.

(o) *Abdul Gani v. Krishnaji*, 10 Bom. H. C. Rep., 416. [297.]

(p) *Bunwari Lal Sahu v. Mahabir Persad Sing*, 12 B. L. R. (P. C.),

sec. 9 of the same Act, and pay the revenue and prevent the forfeiture. It appears to their Lordships that an estate, any portion of which is under attachment, cannot be said to be free from attachment, and is, in fact subject to attachment. The reasons why the Legislature should direct information to be given to a creditor would apply as much to the case of the creditor having a lien on a small, as to one having a lien on the whole or a large part of the estate." (q)

To sell an estate for arrears after lulling the proprietor into a false sense of security by failure to give him the notice which the Law prescribes as a condition precedent to the sale, is of itself a very material injury irrespective of the amount of purchase-money realized, and one amply sufficient to warrant a Court in annulling the sale under section 33, Act XI of 1859.(r)

There is no doubt that the principle under which purchasers of estates at revenue-sales acquire such estates in the condition they were in at the Permanent Settlement, is equally recognized by the last sale-law (Act XI of 1859), and that it applies as much to actual encroachments on the taluk or estate by neighbours, as to incumbrances or under-tenures created on it by the old proprietor, or by his laches. (s)

An auction-purchaser is entitled to all lands situate within his purchased property. (t) He has now 12 years within which to bring a suit to avoid encumbrances and under-tenures under sec. 37 of Act XI (u); and within 12 years from the date of his purchase he may sue to recover any land originally included within the estate sold for arrears of revenue (v). He is barred by implied acquiescence from pleading that he is not bound by the acts of his predecessor, if he does not question those acts at any time within 12 years from the date of his purchase. (w)

(q) *Per* SIR R. P. COLLIER, 12 B. L. R., 302-3.

(r) *Mahabir Prosad Sing v. Collector of Tirhoot*, 15 W. R. 137.

(s) *Per* SETON-KARR and MACPHERSON J. J., in *Goluk Mony Dassie v. Euro Chunder Ghose*, 8 W. R., 62.

(t) *Ram Saran Sahoo v. Veryag Mahtoon*, 25. W. R. 555.

(u) See Act XV of 1777, Sched. ii., Art 121.

(v) *Broomfield Ram Dey v. Kukur Chand*, 15 W. R., 481.

(w) *Siddoyal Ghose v. Gourree Roy*, 18 W. R., 281.

An auction-purchaser has no right to question the acts of a single co-sharer in respect of a lease granted by him of land separately enjoyed by him under an arrangement made by the several coparceners, by which such a lease by one of them was to be looked upon as the act of all. (x)

Where M having purchased the zamindari rights of Government in certain taluks, after a proclamation that a purchaser will be bound by the settlements entered into by it with the dependent Talukdars, defaulted subsequently in the payment of the Government revenue, and the mehal was sold under sec. 37 to G : it was held that G was in a very different position from M and was not bound by the terms of the Government proclamation, but was, as his sale-certificate showed, "the purchaser of an entire estate." (y)

Certain lands in the *Zillah* of Allahabad were sold by the Collector, for arrears of Government revenue in 1802, and a suit to set aside the sale was brought in 1820. Notwithstanding the great lapse of time, restitution of the property was decreed by *Mofussil* and *Sudder Special Commissions* constituted by Regulation I of 1821. On appeal, the decree was confirmed by the Judicial Committee. But, considering the laches of the plaintiff, the conduct of the Government functionaries in the transaction and absence of fraud on the part of the purchaser, the Committee pronounced the purchaser entitled to compensation from Government under cl. 2, sec. 4 Reg. I of 1821. (z)

Engagements entered into by trespassers having no right to occupation of land, can never be good against an auction-purchaser under section 37 of Act XI of 1859. (a) The rights conferred upon a purchaser under this section are transferable to another person, if the transfer follows immediately upon the sale, or within a reasonable time thereafter. (b)

(x) *Monohur Mukerjee v. Joykissen Mukerjee*, 6 W. R., 315.

(y) *Gholam Mukdjom v. Ashuk Jan Bibee*, 25 W. R., 86.

(z) *Muharajah Ishuree Persad Narain Singh, v. Lal Chatterput Singh*, 3 M. I. A., 100.

(a) *Thakur Dass v. Nobin Kristo Ghose*, 22 W. R., 126

(b) *Koylash Chunder Dutt v. Jabur Ali*, 22 W. R., 29.

The purchaser of a specific portion of the land of an estate separately registered with a separate jumma under Section 11—cannot claim a partition of the whole estate and obtain a share of the whole land proportioned to the amount of the sudder jumma paid by him. (c)

A *taluk*, consisting of 210 *mouzas* or villages, classed for fiscal purposes under the names of 74 of the villages, and having by the settlement of 1197 *Fusli*, a separate sum, called the *sudder jumma* assessed upon each of these 74 fiscal villages, the whole constituting the sudder jumma of the *taluk*,—was sold by the Collector by public sale, in one lot, for arrears of Government revenue, at an inadequate price. The sale was by the orders of the Board of Revenue, but there was no direct proof of the Board of Revenue being apprized that the 74 *mouzas* constituted the whole *taluk* or that the sale of any definite portion would suffice to cover the arrears; nor was there any thing to show that, the Board, at any time before the sale, specially sanctioned the sale of the whole *taluk* in one lot, though the sale was subsequently confirmed by it. It also appeared that the surplus of the purchase-money was appropriated by the *mālguzar* for her own purposes,—*Held*, by the Judicial Committee, on a suit by the *mālguzar* against the purchaser to annul the sale, upholding the judgments of the Courts below, so far as they annul the sale of the *taluk* :—

I. That the sale of the whole *taluk*, in the absence of any proof of any specific authority from the Board of Revenue, was contrary to the express provisions of the last Regulation (Reg. XVIII of 1814, sec. 2) on the subject and the spirit and the tone of the whole code of Regulations.

II. That the retrospective operation of other Regulations passed after the date did not directly affect the case under considerations, but simply confirm the view already taken of the Regulations.

III. That the effect of the consequent confirmation of the sale by the Board, was not to render the sale valid, as the Board

(c) *Fakir Chand Sha v. Nobodsep Sha*, W. R., Sp. 59. See *ante* p. 151.

had merely a delegated authority expressly requiring them to exercise their discretion before the sale took place.

IV. That the *mālguzar*, on restoration of the purchase-money should be entitled to reclaim the estate. The acquiescence of the *mālguzar* by appropriating the purchase-money to her own purposes, in a sale believed to have been made by the authority of the Board of Revenue, could not give legal efficacy to a sale altogether void for want of such authority ; and the terms of sec. 27, Reg. XI, 1822, did not refer to cases of money received previous to its promulgation, nor ought in justice to be extended to them.

But their Lordships did not approve the decisions of the lower Courts, which directed the *mālguzar* not to refund the purchase-money, or to call for an account of the mesne profits, being based upon a mere assumption that the purchaser had been fully repaid out of the profits of the estate during his possession ; and directed that an account should be taken of the principal and interest, due on the purchase-money, and also of the net profits during his occupation, making all just and reasonable allowances for permanent improvements. And, as the purchaser stood acquitted of all blame in the transaction, so much of the decree of both the Courts below was reversed, as condemned the appellant in costs, and both the parties were ordered to bear their own costs both in the Courts in India and abroad. (d)

An auction-purchaser at a revenue sale of a permanently settled estate is remitted to all the rights possessed by the original settler at the date of the settlement. In order to abolish tenures and encumbrances subsequently created, his cause of action dates from his purchase. (e)

Where an auction-purchaser at a sale for arrears of revenue applies for measurement of the purchased estate, and no objection is made in the first instance on the score of ability to measure by the ryots, the applicant's right to measure is undoubted. (f)

(d) *Maharajah Mitterjeet Singh v. The heirs of the late Ranee, widow of Rajah Jussunt Singh*, 3 M. I. A., 42 ; S.C. Paudit's P.C.J. Vol. I, 235.

(e) *Nayan Chunder Chowdhery v. Taylor*, 3 Calc. L. R., 151.

(f) *Abdool Barea v. Nittyanund Koondoo*, 21 W. R., 103.

Where a *zaminidari* is sold for arrears of Government revenue, the right to impeach such sale extends not only to the defaulting proprietor, but also to owners of under-tenures. According to Bengal Regulation XI of 1822, sec. 30, the purchaser at a Revenue sale, acquires the property free of all incumbrances, and the under-leases are necessarily extinguished.

Upon a sale for arrears of Government revenue, the Government became the purchasers, and the sale was confirmed. Afterwards, the Government granted a lease for 20 years. At the time of sale, the *zaminidari* was subject to an *istimrari* or perpetual lease. No action was instituted to annul the sale, but the Government, having doubts about the legality of the sale, made over the *zaminidari* to the original proprietors, subject to the recognition of the rights of their (Government's) lessees. Subsequently the original proprietors uphold the lease of the Government lessees to a part of the lands at a reduced rent. In an action by the perpetual lessee for possession and mesne profit:—*Held*, that under Bengal Regulation XI of 1822, section 30, the perpetual or *istimrari* lease was extinguished, and that the Government restoring possession to the original proprietors, subject to the rights of the Government lessees, was a matter of compromise, and that such arrangement did not amount to an unconditional restoration, reversing the sale, which could have the effect of the revival of the perpetual or *istimrari* lease. (g)

Suit to set aside sale for arrears of Government revenue. Act XV of 1877, Sched. II, art. 12 (c).

A suit to set aside a sale for arrears of Government revenue must be brought within one year from the date when the sale becomes final and conclusive. (h)

Act I of 1845 was not intended to afford statutable protection to a purchaser at a sale brought about by fraudulent default, on a pre-concerted arrangement for the purposes of title. No one ought to be allowed to take advantage of his own

(g) *Watson v. Sreemunt Lal Khan*, 5 M. I. A., 447.

(h) *Raj Chunder Chuckerbutty v. Kenoo Khan*, 1 L. R. 8 Cal., 329.

fraud even under a title from a Government sale for arrears of revenue. (i)

In the case of a fraudulent sale under Act I of 1845 by the mortgagee's representative in possession, that Act did not apply so as to defeat the mortgagor's equity of redemption ; such a sale, was to be considered as a private sale, and impressed a trust on the estate which passed under it. The limitation provided by sec. 24, Act I of 1845 was inapplicable in such a case. (j)

A decree of foreclosure made in 1847 by the Supreme Court at Calcutta was *irregularly* obtained. The mortgagees sold the mortgaged estate to A, who, in execution of the decree of foreclosure, which he had also purchased, dispossessed the mortgagor. The mortgagor in 1848 filed a bill in the Supreme Court to set aside the foreclosure decree, and to redeem the mortgaged estate. A was a party to that suit, but, *pendente lite*, having wilfully suffered the estate to fall into arrears of Government revenue, entered into an agreement with M, whereby it was agreed that M should bid for the estate when sold by auction at a sum less than its actual value. At the Government sale M purchased the estate *benami*, and it was subsequently assigned to other alienees *benami*. At the time of the sale to M, the suit for redemption by the mortgagor was pending, and the Court afterwards set aside the decree of foreclosure, and thereby made the estate in the possession of A, under his title from the mortgagees, subject to the equity of redemption of the mortgagor. A plaint in the nature of a supplemental suit was filed in 1860 by the mortgagor, in the Court of the District where the estate was situate, for possession consequent upon redemption, charging generally the whole transaction as between the mortgagees, the purchaser, and subsequent alienees, to have been *collusive* and *fraudulent*. The defendant denied collusion or fraud, and pleaded in bar : *first* the Act, No. I of 1845,

(i) *Seedhee Nasir Ali Khan v. Rajah Ojoodhya Ram Khan*, 8 W. R., 399.

(j) *Nawab Sidhee Nugger Ali Khan v. Rajah Ojoodhyaram Khan*, 10 M. I. A., 540. See also *Sreenath Ghose v. Hurronath Dutt Chowdhury*, 9 B. L. R., 220.

sec. 24, requiring the suit to be brought within *one* year of the Government sale; *secondly*, the general law of limitation, Ben. Reg. III. of 1793, sec. 14, the suit not having been brought within twelve years from the time when the cause of action accrued. It was held by the Judicial Committee:—

First, that the decree of the Supreme Court, setting aside the foreclosure, placed the possession of A upon the footing of a mortgagee in possession, and that from that time his title and his possession were in privity with the mortgage-title, and no longer constituted such an adverse possession as could be pleaded in bar to the suit, under Ben. Reg. III. of 1793, sec. 14.

Second, that as there had been a fraudulent sale, under Act No. I of 1845, by A, the mortgagee's representative in possession, that Act did not apply so as to defeat the mortgagor's equity of redemption, and that the sale was to be considered as a private sale, and impressed with a *trust* on the estate which passed under it. It was also held that as there was a fraudulent agreement between the mortgagee's representative in possession and the purchaser at the Government sale, both were estopped and precluded as against the mortgagor, from relying upon the *illegality* of their contract. It was further held that the effect of a foreclosure decree in the Supreme Court in a mortgage-suit between Hindoos is equivalent to a decree establishing proprietary right in the Courts in the Mofussil in a similar suit; and that by the procedure of the Courts in India, the Courts are bound to proceed according to the facts alleged in the plaint, and not to refuse to try issues of fact upon the merits, on the ground of the legal effect of the facts alleged in the plaint. (k)

The case alleged in this suit was one of fraudulent mis-dealing with the property pledged. The arrears of Government revenue were *designedly* incurred to bring about the sale, and the plaintiff claimed a right as it were to confess and avoid that sale, by imposing a trust on the estate which passed under it. The real questions in the case were whether the plaintiff

(k) *Nawab Sidhee Nazur Ally Khan v. Rajah Ojoodhyaram Khan*, 10 M. I. A., 540—41.

could, in point of law, insist, notwithstanding the auction-sale for arrears of revenue, that as against him, the sale ought to be viewed as a private sale, and whether the Act (I of 1845) applied to the present case. The High Court and the Privy Council both decided that the Act was not designed to protect a fraudulent purchaser on the ground that a man ought not to be allowed by law to take advantage of his own wrong; and they treated the case of such a purchaser as beyond the protection intended to be given by the Act to purchasers under an auction-sale. Sir James Colville in his judgment whilst he declares a Government sale for arrears of revenue to give a title against all the world with certain statutory exceptions, engrafts on that general rule this saving, that a fraudulent purchase at such auction-sale by a mortgagee will not defeat the equity of redemption. "It is therefore settled law that if a mortgagee in possession allows the Government revenue to fall into arrear, with a view to the land being put up to sale and his becoming himself the purchaser of it, and he does in fact, so become the purchaser of it, such a purchase gives him no absolute title. One who being in possession as mortgagee or trustee, fraudulently obtains the proprietary right, is to be treated as still in the position of trustee, as regards the person defrauded. In this case there was a mortgage in the English form, and the mortgagee remained in possession under it. Being so in possession he, for the purpose of defrauding the mortgagor, made wilful default* in the payment of Government revenue, and at the sale

* The temptation to the proprietor to bring about a sale is in some cases very great. "Looking to the fact that the value of land in the permanently settled districts has increased very rapidly, whilst the revenue payable to Government has remained the same, and that a forced sale by auction is rarely an advantageous method of disposing of property, it may seem, at first sight, impossible that a sale for arrears of revenue can be anything but a serious disaster for the proprietor. But so far from this, it may happen to be one of the most fortunate things that can happen to him. Inasmuch as the sale for arrears of revenue gives a title to the purchaser clear of all or nearly all the incumbrances, the price obtained very often considerably exceeds the value of the Zemindar's interest. Nevertheless, after payment of the trifle of revenue for which the sale may have taken place, the surplus sale proceeds belong to the Zemindar, subject (practically at least) only to payment of the mortgage debts; and even this right the mortgage finds it sometimes difficult to enforce. Consequently it is by

which was held in consequence, he himself purchased the property *bendani*. The Court was of opinion that such conduct was highly fraudulent and that the mortgagee had committed a criminal offence under section 405 of the Indian Penal Code. (l) In support of this view we may refer to other authorities. In the celebrated opinion of C. J. DeGrey in the House of Lords, in *The Durhes of Kingston's case* (m), he says, 'But if it was a direct and decisive sentence upon the point, and, as it stands, to be admitted as conclusive evidence upon the Court, and not to be impeached from within; yet, like all other acts of the highest judicial authority, it is impeachable from without, although it is not permitted to show that the Court was mistaken, *it may be shown that they were misled.*' 'Fraud,' his Lordship proceeds to state, 'is an extrinsic collateral act, which vitiated the most solemn proceedings of Courts of Justice. Lord Coke says, it avoids all judicial acts, Ecclesiastical or Temporal.' The Chief Justice then proceeds to state that fines and recoveries may be avoided for covin by strangers, and gives other illustrations of the same principle. The case of *Collins v. Blantern* (2 Wils 341) is an authority to show, if any were needed, that a Court will strip off all disguises from a case of fraud, and look at the transaction as it really is."

Whenever the land revenue is in arrear, Government is en-

Fraudulent purchaser—Trustee for the owner in equity—Act X of 1876, sec. 4, clause (c)—Claims to set aside a revenue sale—Forfeiture of tenancy—Jurisdiction.

titled to sell the land and to realize its due, whoever is the defaulter. In a Bombay case the plaintiff sued to recover possession of certain land and prayed to set aside the sale of it by the Revenue Authorities for arrears of assessment, due on the land. He alleged that he had let the land to the defendant, on condition of

the latter paying the Government assessment and certain rent in cash and kind to the plaintiff; that the defendant having

no means rare for sales to take place, where there is no other default than that wilfully created by the Zemindar." MARKBY'S Lectures on Indian Law, pp. 26—27.

(l) *Ram Manick Shaha v. Brindabun Chunder Poddar*, 5 W. R., 230.

(m) 2 Smith's Leading Cases, 760.

intentionly made a default in payment of the assessment, fraudulently caused the land to be sold by the Revenue Authorities and purchased it himself. The defendant traversed the plaintiff's allegations and stated that he was in possession of the land as purchaser at the revenue-sale. The Subordinate Judge rejected the plaintiff's claim, holding that he failed to prove either the defendant's liability to pay the assessment or any fraud on his part, with respect to the sale of the land, and that the sale could not be set aside. His decree was affirmed in appeal by the Assistant Judge on the sole ground that the sale could not be set aside. He did not go into the merits of the case. On appeal to the High Court, it was held (by Sir M. R. Westropp, C. J., and Mr. Justice F. D. Melvill) that the plaint ought not to have contained any prayer for setting aside the sale, but that, as it contained a prayer for possession, it might be read as praying (or at least that the plaintiff might have been permitted to amend it so that it might simply pray) that the defendant should, under the circumstances alleged by the plaintiff, be declared a trustee of the land for the plaintiff. It was also held, that if the plaintiff's allegations were true, the plaintiff would be entitled to such a declaration, and the defendant would be discharged of his sub-tenancy in consequence of his conduct—"wilful or negligent omission to pay the revenue"—which worked a forfeiture of any right to be continued as tenant. (n) In such a state of facts, the defendant is in conscience bound to hold the purchased land in trust for the plaintiff, and on demand to make it over to the possession of the latter.

In a case where the plaintiffs were purdanashin ladies and one of their several co-sharers fraudulently allowed the Government revenue of the plaintiff's portion of the estate to fall into arrears, and led the other co-sharers who were ready to make the payment on their (the plaintiff's,) behalf to suppose he was going to save the estate from sale, and thus fraudulently contrived to

(n) *Balkrishna Vasudeb v. Madhavav Narayan*, I. L. R., 5 Bom. 72-73.

bring the estate to sale for arrears of revenue under Act XI of 1859, and purchased it in the *benāmi* of his son after making false representations to those present at the sale as to the condition of the estate, it was held by the Calcutta High Court, that another co-sharer aggrieved by the sale could maintain a suit to have the property re-conveyed though the period limited by sec. 33 of Act XI of 1859 and by article 14 of the second schedule to Act IX of 1871, for a suit to set aside the sale, had expired. The learned Judges (Birch and Mitter, J. J.) who delivered their judgments in this case treated it as a case for relief on the ground of fraud inasmuch as the plaintiffs sought to be relieved from the effect of the fraud of the defendant by reason whereof they had been deprived of their property, and they asked to be placed *statu quo, i e*, in the position in which they were before the auction-sale took place. (o)

In 1775 a rent-free sanad was granted to M for having put down wild elephants, the consideration in future being to cultivate and keep up a body of men, and take care of the ryots. M died, and a fresh sanad was in 1786 granted to K and R, they being thought to be his heirs; but in 1807, M's true heirs having established their title, Government gave them a fresh sanad in lieu of the one to K and R, reciting the circumstances; both these sanads were to cultivate, keep up a body of men, keep off elephants, and attend to the safety of the ryots. *Held*, that this was not a service-tenure that could be resumed.

The zamindari in which these lands were situated was settled in 1802, and was in 1850 sold for arrears of Government revenue; the appellant claimed to set aside the sanad of 1807, on the ground that Government had no right to give such a sanad, but he contended that, if it had, it could be set aside by a purchaser at a Government sale. *Held*, that the sanad was not a new grant, but a confirmation of the one made before the Decennial Settlement, and that Government was competent to

(o) *Sen v Mosowmdar*, I. L. R., 3 Calc., p. 800.

give such confirmation. The Judicial Committee observed:—
 “Had this been a grant reserving to the Zamindar a small money-rent as well as the services, if indeed the latter are reserved to the Zamindar, their Lordships would have had no doubt upon the case. But it seems to them that the unexplained anomaly of making *mâl-lands* rent-free in the hands of the *Jâghirdars*, does not affect the construction of the sanad, or the rights of the parties. It emphatically lay upon the appellant (purchaser at the sale for arrears of Government revenue), who is seeking to dispossess or to rack-rent, respondents, who by themselves, or their ancestors, have brought these lands into cultivation and enjoyed them for so long a period; who must have been permitted by former Zamindars to continue undisturbed in such enjoyment long after the incursion of wild elephants had become a matter of tradition, *to make out a clear title to resumption*. In their Lordship’s opinion he has failed to do so; and therefore, though they dissent from the particular grounds on which the High Court has dismissed the suit, they think its dismissal was right and ought to be affirmed.” (p)

An estate having been sold for arrears of revenue under Regulation XI of 1822, it was purchased by Government, and the Government, as landlord, raised the rents throughout the property. *Held*, that the revenue-sale cancelled all former arrangements entered into intermediately by the former proprietors, and that the fresh settlement made by Government with the present proprietors will not restore former arrangements and rates because they happen to be the heirs of the former proprietors. (q)

An auction-purchaser at a sale for arrears of revenue is to be bound not by what is represented to him by private parties *e. g.*, the Sheristadar and other officers, but by the conditions of sale published by notification in the Official gazette. (r)

(p) *Alarander John Forbes v. Mir Mahomed Tahsi*, 5 B.L.R., 529—30.

(q) *Gungamona v. Mt. Luteefoonassa Chowdhraan*, 7 W. B., 196.

(r) *Prithac Ram Chowdhrey v. Collector of Goalpara*, 17 W. B., 531.

A shareholder voluntarily coming forward and paying an arrear of revenue due by a defaulting co shareholder, who has a separate account, before the share of such defaulter has been put up for sale under sec 13, Act XI of 1859, cannot claim to be re-imbursed by such defaulter, nor is the defaulter under any legal obligation to repay the amount advanced. (s)

The object of the Sale Law is to give a title to the purchaser which shall not be open to challenge by any body. (t)

The title of an auction-purchaser accrues not from the date of sale, but from the date on which the sale was confirmed, and a certificate granted. (u)

Proclamation under sec. 29, Act XI of 1859 is an act of delivery of possession, from which an auction-purchaser may date his cause of action. (v)

But a sale under Act XI of 1859 may not be set aside on the ground of irregularity in the issue of notices, unless such irregularity is shown to have caused loss or damage to the defaulter. (w)

A suit to set aside a sale on the ground that no arrear of revenue was due, may be brought in the Civil Court without previous appeal to the Commissioner. (x)

The Limitation Act prescribes one year as the time for bringing a suit to set aside a sale for arrears of Government revenue or for any demand recoverable as such arrears. (y)

But this limitation will not apply where the sale has been brought about by fraud. (z)

Where the original owner in the case of the sale of his estate for arrears of revenue, where no such arrears exist, sues to recover possession and obtains a decree, the decree is sufficient

(s) *Kissen Chunder Ghose v. Muddun Mohun Mozoomdar*, 7 W. R., 365.

(t) *Woomesh Chunder Chatterjee v. Collector of 24-Pargunnahs*, 8 W. R. 439.

(u) *Dheput Sing v. Muthoor Nath Jai*, W. R., Sp. 278.

(v) *Mozuffer Wahid v. Abbas Subhan*, 6 Cal. L. R., 539.

(w) *Mussumut Lalita Koer v. Collector of Tirhoot*, 19 W. R., 283.

(x) *Thakur Churn Roy v. Collector of 24-Pargunnahs*, 13 W. R., 336.

(y) Act XV of 1877, Sched. II, No. 12.

(z) *Bhobun Chunder Sen v. Ram Sunder Mozoomdar*, 1, L. R., 3 Cal. 600.

for the purposes of sec. 34, Act XI of 1859, without a special declaration that the sale is annulled ; and the order for refund of the purchase-money must be made in the execution of the decree. (a)

The purchaser of an *ausat* taluk cannot eject the holders of *howla* and *neem howla* tenures existing before any settlement was made of the Mahal as an *ausat taluk*, so long as they pay their *jamma* according to the settlement *jumma-bundi*. (b)

A purchaser at a sale for arrears of Government revenue, with a paramount title under sec. 37, Act XI of 1859, acquires the estate free from any incumbrance which accrued thereupon from the *laches* of former proprietors, in the same way as he would have acquired it free from any encumbrance created by sale, lease or mortgage. In the absence of any proof to the contrary, such purchaser must be assumed to be the owner. (c)

The Civil Court decreed partition (batwara of an estate) upon a suit brought by some of the co-sharers in the estate, and ordered the plaintiffs to pay the costs of the partition. The Collector, however, called upon the defendants, the other co-shares, to pay a portion of the fees of the Amîn who effected the partition, namely, in proportion to the shares allotted to them by the decree, and in default of payment of the whole of such portion, he sold the defendants' shares in the estate. It was held that the sale by the Collector was *ultra vires*, and therefore *ab initio* null and void, and that a suit was maintainable in a Civil Court to set aside the sale and for recovery of the property. (d) "The jurisdiction of the Collector to hold a sale under Act XI of 1859, is essentially dependent upon the existence of a legally sufficient arrear, and it appears to me unreasonable to suppose that the Legislature has taken away from parties their remedy in a case in which no arrear was due, when a mere informality

(a) *Sreemunt Lall Ghose v. Shama Soondery Dassia*, 12 W. R., 276.

(b) *Kali Kenkur Roy v. Gobind Chunder Gooko*, 7 W. R., 50.

(c) *Thakoor Dass Roy Chowdhery v. Nobeen Kissen Ghose*, 15 W. R., 552.

(d) *Buynath Sahu v. Lala Sital Prasad*, 2 B. L. R. (F. B.) 1 S. C., 10 W. R., F. B. 66.

in conducting the sale might be sufficient to vitiate it." (e) Mr. Justice Jackson in delivering his judgment said :—"Where the competency of a Court or an authority invested with a limited jurisdiction to do a particular act depends upon a condition precedent, and that condition is not shown to exist, the act done in the absence of such condition will, I think, be wholly void, and an action will lie to set it aside, as in the case of an adjudication of bankruptcy where the party adjudged a bankrupt is not a trader, or there is no debt due to a petitioning creditor. I take it, therefore, that if the plaintiff can show that the act is irrelevant, his suit to set aside the sale will be quite maintainable.

"In this case it is quite clear that the plaintiffs were under no liability to pay in the expences of a proceeding which was not for their benefit, and that the sale, under such circumstances, of their estate as for an arrear of Government revenue, was an act done wholly without authority; that the sale conveyed no title, and that the plaintiffs are, consequently, entitled to recover possession by a suit in the Civil Court." (f)

Where, therefore, there has been a sale under Act XI of 1859, for arrears of revenue, but it is found that no revenue is actually due to Government, the sale must be set aside as not coming within the provisions of the Act. "It seems to me," observed Mr. Justice Hobhouse; "that it is a condition precedent to the assumption and exercise of any power or authority by the Collector under Act XI of 1859, that there should be an arrear of revenue due before he can institute proceedings under the Act." (g)

One of the co-sharers in an estate which had been sold under Act XI of 1859 sued to recover her share from the certified purchaser (M) himself one of the original owners. Her case was that she provided a portion of the purchase-money, but that her name was

Purchase by
former proprie-
tor. Sec. 36 of
Act XI of 1859.

(e) *Per* DWARKA NATH MITTER J., 2 B. L. R., (F. B. R.), 8.

(f) *Per* JACKSON J., 2 B. L. R., F. B. R. 18 & 20.

(g) *Mangins Khata v. The Collector of Jessore*, 3 B. L. R., Ap. 144.

not registered on account of M's having no written authority to act on her behalf. M, however, executed an ekrânâmâh in which he admitted receipt of the purchase-money of the plaintiff's two annas share and covenanted to give her possession. Defendant denied having received any contribution or consideration-money from the plaintiff, though admitting execution of the ekrânâmâh. *Held*, (i) that there is nothing in Act XI of 1859 which makes it illegal for a former proprietor or co-sharer to be a purchaser of his estate at a sale for arrears due on that estate ; (ii) that no separate title was given to plaintiff by the ekrânâmâh, and that the suit was substantially one to oust a certified purchaser on the ground that part of the purchase was made on behalf of another person, and the plaintiff was, therefore barred by sec. 36* of the Sale Law, and (iii) that even if the ekrâr fully and unequivocally admitted payment of the consideration-money, that would not be conclusive evidence of payment as against the defendant and proof would have to be given. (h)

A certified purchaser at a sale for arrears of Government revenue, suing to recover possession of which he has been ousted, is not debarred from the benefit of sec. 36, Act XI of 1859, and from pleading that the defendants were not entitled to sue him as being merely a *bendmidar*. But he may be so debarred if he has acknowledged that the property in truth was not his, that his holding was merely that of a trustee and that the property belonged to those from whom the defendants were purchasing—admissions whereby he induced the defendants to purchase. (i)

(h) *Mussamat Ncyum v. Muzuffur Wahid*, 11 W. R. 265.

(i) *Judub Ram Deb v. Ram Lochun Mudruk*, 5 W. R. 56. See also *Toondum Sing v. Pohnanani Singh*, 5 B. L. R., 548—49.

* SEC 36 OF ACT XI OF 1859

XXXVI. Any suit brought to oust the certified purchaser as

Suit brought to oust a purchaser on the ground that the purchase was made for another person, to be dismissed.

aforsaid on the ground that the purchase was made on behalf of another person not the certified purchaser, or on behalf partly of himself and partly of another person, though by agreement the name of the certified purchaser was used, shall be dismissed with costs,

In this case the plaintiff was not only the certified purchaser, but held rent receipts from tenants and had actually obtained possession under his purchase before he was ousted.

In a suit to recover possession by the ostensible purchaser of an estate sold for arrears of revenue under Act I of 1845, where it was found that the plaintiff had stood by ever since his purchase and had for 11 years allowed the defendants to remain in possession and enjoy the usufruct as proprietors : it was held that the defendants had a good defence against the plaintiff and that the burden of proof was rightly thrown on the plaintiff. (j)

Under sec. 53, Act XI of 1859 a *benâmi* purchaser on behalf of the old proprietor is not entitled to get rid of the encumbrances created, suffered, or allowed to remain, by the old proprietors before the sale. (k)

Section 36 of Act XI of 1859 appears not to apply to the case of property purchased *benâmi* at a sale for arrears of revenue and remaining for more than 12 years from the date of sale in the adverse and undisturbed possession of the beneficial proprietor. Such possession is not only sufficient to extinguish the title of the nominal purchaser, but creates a title in the former capable of devolving upon his legal heirs and representatives. (l)

A *benâmi* purchase at a sale for arrears of Revenue is unlawful, and a *benâmi* purchaser under Regulation XI. of 1822 was equally with one under Regulation VII. of 1799 *malum prohibitum*, and on such a transaction the *benâmi* purchaser acquired no interest in the land which a Court of law would enforce or recognize against the ostensible purchaser. (m)

A purchase by a managing member of a joint Hindu family in his own name, but on behalf of the joint family at a revenue sale held under Act I of 1845, is not affected by the 21st* section of the Act ; and notwithstanding anything contained

Benâmi Purchase at a Revenue sale by Manager of a Joint Hindu Family.

(j) *Shakh Johar Ali v. Brindabun Chunder*, 14 W. R. 10.

(k) *Alum Manji v. Ashad Ali*, 16 W. R. 138.

(l) *Booa Russuli v. Nawab Nassim of Bengal*, 11 W. R. 382; 14 W. R., 10.

(m) *Judoo Nath Chowdhery v. Suttroogun Acharjee*, Bouleiois' Rep. 557.

* Corresponding to sec. 36, Act XI of 1859

therein, the members of the joint family can sue to enforce rights acquired by them under such a purchase, as against the managing member, though he is the sole certified purchaser (n) Their Lordships of the Judicial Committee entirely concurred with the opinion of the Calcutta High Court as expressed by Mr. Justice Norman : " The case of a purchase at a sale for arrears of Government revenue made by the manager of a joint Hindu family in his own name, on behalf of the joint family, does not appear to be expressly provided for by sec. 21, Act I of 1845, and it would only be a forced construction that such a case could be brought within the terms of that section. The section is a *penal* one, and should, we think be construed strictly. The suit is not brought to oust the purchaser, but to establish the rights of his co-sharers as joint owners with him. The language of sec. 21, Act XI of 1845, is different from that of sec. 36, Act XI of 1859. Words are introduced in the latter enactment which may probably include the case of a purchase by the managing member of a joint family in his own name." (o)

A in exchange for his lakhiraj land obtained in 1791 from his Zamindar 441 beegahs of māl land, which the Zamindar thereupon created rent-free. The Zamindar fell into arrears, and the zamindari was sold. Subsequently three persons, who had become owners of the zamindari, applied to the Collector, under Section 11, Act XI of 1859, and the Collector opened separate accounts with each of them for the revenue of their respective shares. The revenue due from one of them fell into arrears, and his share which included the 441 beegahs was sold under Section 13, and purchased by the plaintiff, who now sued the descendants of A. to recover possession.

Held that a sale of a share of a zamindari, under Section 13, Act XI of 1859, does not convey to the purchaser the share free from all encumbrances created by the former Zamindar, but he acquires the share, as laid down in Section 54, subject to all encumbrances.

(n) *Toondun Singh v. Polhnarain Singh*, L. R., 1 I. A., 342

(o) *Ibid*, 5 B. L. R., 548—49 See *ante*, note (i)

Held also that under sec. 3, Regulation II of 1805, possession of land for a period upwards of 60 years since the passing of Regulation XIX of 1793, without payment of rent, bars the remedy of the Zamindar to dispossess the holder or to resume the land as *mâl*.* (p)

Where certain *howalut*† and *neem-howala* tenures were never set aside by the revenue settlement or Revenue Commissioner's orders, from the time they were recorded as existing rightful hereditary tenures of those classes at the first settlement, it was held that the purchaser of the *ousat* taluk can not eject the holders of those tenures under sec. 52, Act XI of 1859 so long as they pay their jumma according to the settlement jumma-bundee. Mr. Justice Bayley observed: "It is not by any means incompatible with the rights of Government as a proprietor, that *howalas* and *neem-howalas* duly constituted originally and since existing should be maintained. If they are found valid holdings they are always upheld by Settlement Officers at their *old* jumma, whether in Government mehals or not, and the power to eject does not exist as long as they pay their jummas recorded in the settlement jumma-bundee." (q)

(p) *Kasinath Krouur v Bankobehari Chowdhry*, 3 B L R., A. C., 446.

(q) *Baroda Kanta Lahu v. Ghibind Ohunder Goocho*, 7 W. R. 50.

* *MAL*—Rent-paying.

† *HOWALA*—A description of tenure in Eastern Bengal. An intermediate holding of a part of an estate or of a farm under a Zamindar or Talukdar, to whom a stipulated portion of the rents collected from the ryots is paid. *Neem-howala*—a division of the above. *Bye-howala*—a division of *neem-howala*.

N. B.—Revenue sales in Lower Bengal have been regulated from time to time by the following enactments:—Reg. XLIV of 1793; Reg III of 1794; Reg. V of 1796; Reg. VII of 1799; Reg. I of 1801; Reg. V of 1812; Reg. XI of 1822; Act XII of 1841; Act I of 1845; and Act XI of 1859.

Section 2.—(A) Sales for Arrears of Rent

By virtue of a sale of an under-tenure or an ordinary lease-hold interest under section 59 of Act VIII of 1869 (B. C.), the purchaser acquires it under secs. 59, 60 and 66 free of all encumbrances which may have accrued thereon by any act of any holder of the said under-tenure, his representatives or assignees, unless the right of making such incumbrances shall have been expressly vested in the holder. (r)

A ryot's tenure having been sold for arrears of rent under Act X of 1859, the purchaser is entitled to be put in *khâs* possession of the *entire* tenure as it originally stood, notwithstanding that the sons of the ryot have been occupying huts on the land for more than 20 years. The circumstance that the purchaser happens to be the superior landlord does not diminish his right. (s)

A tenant cannot by merely alienating his tenure deprive the Zamindar of the right which he would otherwise have to sell it in execution of a decree for arrears of rent. A Zamindar can sell the tenure in the hands of the transferee, not being one of the judgment-debtors, if he does so with reasonable promptness : provided he has not done any thing to recognize the transfer.

Where a Zamindar makes a transferee a party to a suit for rent and accepts a decree against him jointly with other persons, he must be held to have recognized the transferee as a tenant, although the latter's name may not have been entered as such in the Zamindar's books. (t)

Under-tenures sold for arrears of rent under sec. 105, Act X of 1859, other than tenures upon which the right of selling

(r) *Dolar Chand Sahoo v. Lalla Chabesi Chand*, L. R., 6 I. A., 47.

(s) *Tilottama Debee v. Brojolal Shamunt*, 8 W. R., 478

(t) *Ram Kishore Acharjee Chowdhry v. Krishna Monee Debia*, 23 W. R., 106.

for arrears of rent has been specially reserved by stipulation in the engagements—pottah and kabuliāt—interchanged on the creation of the tenures, do not pass free from encumbrances. (u)

Co-sharers in immovable property in this country do not occupy the same fiduciary position towards each other as partners under English law. (r)

Of three joint owners of a *darpatni*, two held each a four-annas share, and the third an eight annas share. Default having been made by all three in the payment of the rent, the *patnidār* brought a suit and obtained a decree for the arrears. In execution of this decree, proclamation was made that the *darpatni* would be sold on the 5th of October 1877. Up to the commencement of the sale, the four-annas share-holders were unable to pay their proportionate amount of the decree. The eight-annas share-holder declined paying his share, and, when the sale took place, he became the purchaser of the *darpatni*. In a suit brought by the four-annas shareholders to recover their shares from the purchaser, it was held upon special appeal to the Calcutta High Court that the sale having taken place as much through the default of the plaintiffs as through the default of the defendant, the former had no equity against the latter; and that therefore the suit should be dismissed. *In pari delicto potior est conditio defendentis*. (v)

Where the sale of a tenure for arrears of rent was brought about by collusion between the party in whose name it stood and the purchaser, with a view to get rid of a co-sharer who had neglected to have his share transferred to his name: it was held, that the transaction was a private sale, and not really an auction-sale for the purpose of realizing the zamindar's rent; and that, on payment of his share of the rent, the co-sharer was entitled to have his share re-conveyed to him. (x) "It being found," observed Mr. Justice Markby, "that there was

(u) *Shahabooddeen v. Futtah Ali*, (F. B.) B. L. R., Sup. Vol., 646.

(v) *Per MR. JUSTICE FIELD in Ram Lall Mukerjee v. Debender Nath Chatterjee*, L. L. R. 8 Cal., 11.

(w) *Ibid.* 8.

(x) *Kishore Chunder Sein v. Kally Kinkar Paul Chowdhry*, 20 [W. R., 338.

collusion between the purchaser and the person who conducted the sale, the case falls within the principle of the decision of the Privy Council in the case of *Nazir Ali Khan*, 5 W. R., P. C., 81. The gist of that decision appears to be that, as the sale was not really a public one for the purposes of realizing revenue, but only a device to give to what was really a private transaction the incidents of a public sale, it ought to be treated as a private sale only. So it seems to me here that there was not really an auction-sale for the purposes of realizing the Zamindar's rent, but only a private transaction between the appellant and the Zamindar's agent carried on under the appearance of an auction-sale. And I think the decision of the Privy Council warrants us in holding that whatever may be the forms gone through, no one will be allowed by means of a fictitious auction sale to cause a loss to another, and a benefit to himself.

"Upon these grounds, therefore, I think the judgment of the Courts below is right and ought to be affirmed; but, as pointed out in the case of *Shibo Soonduree Dossee v. Panch-cowree Chandra* (14 W. R., 159), I think the proper course is to direct the appellant to reconvey to the respondent his share in the property."

An auction-purchaser is no exception to the rule by which every landlord is bound to ascertain the nature, extent and conditions of his ryot's holding before he serves him with a notice of enhancement. (y)

Where an *istmarari* sub-tenure had been granted prior to 1793, but no power was reserved to the grantor in the sanads to sell the tenure free from encumbrances in case of default in payment of rent, it was held by the Privy Council that in a sale for arrears of rent under Reg. VIII of 1831,* the purchaser did not take free from encumbrances created by the grantee. (z) In this case after the plaintiff (mortgagee) had upon foreclosure of mortgage become absolute owner of certain taluks and obtained a decree for possession and

(y) *Lulla Singh v. Mt Bibee Reazonissa*, 8 W R., 271

(z) *Forbes v. Lutchnes Put Singh*, 10 B. L. R., (P. C.) 139.

* Repealed by Act X of 1859

been put in symbolical possession by the Zilla Court, the Zamindar brought a summary suit for rent in the Collector's Court against the heirs of the mortgagor, who allowed judgment to go by default, and an *ex parte* decree was made against them. In execution of that decree the taluks were sold to the Zamindar's muktia at a grossly inadequate price. Both the Zamindar and his muktia had the fullest notice of the appellant's (mortgagee's) title and of his efforts to obtain possession before the decree for sale. The Privy Council said :—"It requires very plain positive law to support such a sale against the real owner under a decree thus obtained. No authority was shown to satisfy their Lordships that, by any law or usage, Zamindars had the power to sell tenures of this kind for arrears of rent, as a right inherent in or incident to the tenure, or that such power rightfully exists, unless by special stipulation, independently of the Regulations. Their Lordships do not desire by this judgment to weaken any powers that Zamindars may, by law, possess to enforce payment of rent. The only question their Lordships are called upon to decide is as to the validity of this sale, and they have come to the conclusion, that under the Regulations in force at the time, and under the circumstances of this case, the sale was invalid." In awarding mesne profits to the appellant (owner by foreclosure) against the purchaser, the Judicial Committee observed :—"Considering that the Zamindar proceeded to obtain a sale of the tenure, notwithstanding he had notice of the appellant's title, and of the order made by the Zillah Court for giving him possession, and that such sale has been the means of keeping the appellant out of possession, and the cause of this suit, and that he has persistently disputed the title of the appellant, their Lordships are of opinion that the decree for mesne profits should be against the heirs of the Zamindar, as well as against the purchaser (muktia), but that execution should not be had against such heirs in respect of them until after failure to obtain satisfaction from the purchaser." (a)

(a) 10 B L R., at p. 155; 17 W. R. at p. 201

In a suit to annul the sale of an under-tenure in execution of a decree, under Act X of 1859, which was subsequently set aside on the allegation that it had been obtained collusively and by fraud, it was found that neither the decree-holder nor the purchaser was guilty of any fraud. *Held*, that the mere circumstance of the decree under which the sale had taken place having itself been set aside, did not invalidate the sale, the plaintiff having failed to show that the purchaser was a party to the fraud which led to the decree and sale. (b)

A purchased a share of B's taluk at an auction-sale, in execution of an *ex-parte* decree obtained against B, under sec. 105 of Act X of 1859. B obtained leave under sec. 58 of Act X of 1859 to revive the suit, and succeeded in getting it dismissed. He now sued to set aside the sale to A. It was held, that the sale to A was binding against B, notwithstanding that the decree in execution of which it had taken place had been set aside in review, provided the sale was *bond fide*. (c)

All under-tenures which are transferable by sale, are hypothecated to the landlord for the rent; and the tenant cannot, by disposing of the tenure to a third party, deprive the landlord of his lien upon it. Thus, where the plaintiff had purchased, under a Civil Court decree, the rights and interests of a tenant in a certain under-tenure, and this under-tenure was afterwards brought to sale for arrears of rent by the Zamindar, it was held that the purchaser under the Act X sale, and not the plaintiff, was entitled to possession. (d) It must now be taken as an established principle of law, that no sales for arrears of rent have *ipso facto* the effect of cancelling the tenures created by defaulting owners, but merely to give the purchaser the power to do so if he thinks proper. (e)

(b) *Jugal Kishor Banerjee v. Abhaya C Sarma*, 1 B. L. R., A. C. 84.

(c) *Jan Ali v. Jan Ali Chowdhry*, 1 B. L. R. A. C. 56.

(d) *Khoobaree Rai v. Roghoobur Rai*, 2 W. R., 131; *Gopaul Mundul v. Soobhudra Boustobee*, 5 W. R., 205; *Mussamat Safuroonissa v. Saree Dhoobee*, 8 W. B., 384; see also *Ramjeebun Chowdhry v. Pearyloll Mundle*, 4 W. B., (Act X), 30; *Golan Ohunder Dey v. Nuddar Chand Adheekaree*, 16 W. B., 1; *Sham Chand Koondoo v. Brejonath Paul*, 21 W. R., 94.

(e) *Madhusudan Kundu v. Ramdhan Ganguli*, 3 B. L. R., A. C. 431; 12 W. B., 388; *Inwar Chandra Chuckerbutty v. Bistu Chandra Chuckerbutty*, 3 B. L. R., App., 97; 12 W. B., 32.

Section 2.—(B) Patni Sales in Bengal.

A "patni-taluk" *prima facie* conveys an hereditary and transferable interest in land. (f) In *Tarachand Biswas v. Ram Gobind Chowdhry* (g) it was contended that a patni lease, though it is in form a lease, is in fact and in substance a complete transfer of all the lessor's rights in the land subject to a perpetual quit or ground-rent. Mr. Justice Jackson in delivering the judgment of the Court in the case made the following observations :—"It seems to us that patnis, darpatnis and sepatnis, although they may not be in strict analogy with leases in England, lie somewhere between out-and-out sales and leases, and that at all events they contain in themselves sufficient of the nature of a lease to incline us to give the grantee or taker, in cases where it is otherwise equitable, that protection which a lessor in England is understood to guarantee his lessee for possession of the land. In the first section or preamble of Reg. VIII of 1819, patnis and the subordinate darpatnis and sepatnis are throughout spoken of as tenures and under-tenures, and the instruments granting them are called leases.

"The fact, that a consideration is commonly paid, does not seem to us to make the transaction as one of pure sale, because it arises from this generally that the grantors are persons in need of money. Their needs vary with circumstances and according as their need for money is greater or smaller, the consideration is in proportion larger or smaller, and the rent reserved is accordingly smaller or greater."

"A sale under the 11th section of Beng. Reg. VIII of 1819," said the Privy Council in *Watson v. Collector of Rajshye* (h) "gives to the purchaser—assuming, of course, that the sale has been regularly conducted—what we may call a Parliamentary title." The Regulation declares that the tenure shall be sold

(f) *Madhusudan Kundu v. Ramdhan Ganguli*, 3 B. L. R., A. C. 431.

(g) I. L. R., 4 Cal. 779.

(h) 13 M. L. A., 176; S. C. Pandit's P. C. J., Vol. II, 606.

free of all encumbrances that may have accrued upon it by act of the defaulting proprietor, his representatives or assignees, unless the right of making such encumbrances shall have been expressly vested in the holder, by stipulation to that effect in the written engagements, under which the said taluk may have been held. An auction-purchaser under Act VIII of 1865 (B.C.) cannot, without notice, cancel a pre-existing under-tenure. (i)

Where, in a suit to set aside a patni sale under Reg. VIII of 1819, it was proved that the notice of sale was first stuck up in the catchery of the ijâradâr (the mahâl having been let out in ijârâ by the patnidar), and on the refusal of the ijâradâr's gomasta to give a receipt of service, it was taken down, and subsequently personally served on the defaulting patnidar at his house, which was at some distance from the patni mahâl, *held*, that the object of the provisions in Reg. VIII of 1819 as to the service of notice of sale is not only to give notice of sale to the defaulter, but also to under-tenants, and to advertise the sale on the spot for the information of intending purchasers; but though those provisions had not been strictly complied with, yet as the plaintiff (the patnidar) did not allege that in consequence of the defective publication there was not a sufficient gathering of intending purchasers, nor that the under-tenants were ignorant of the sale, and were prejudiced by such ignorance, nor that the mahâl was sold below its value, it was held, that the defect did not amount to a "sufficient plea" under sec. 14 for setting aside the sale. (j)

The statutory sale of an under-tenure under Reg. VIII of 1819 cannot be set aside, because one of the witnesses to the notice (which was in fact served) turns out not to be substantial. The High Court's construction of the word "substantial" in sec. 8 of the above Regulation, as meaning a wealthy man from whom damages could be recovered by the patnidar in

Patnis—Sale under Reg. VIII of 1819, sec. 8—Construction of the word "Substantial."

(i) *Gobind Ohunder Bose v. Alimooddeen*, 11 W. R., 160.
(j) *Gouree Lal Singh v. Joodhisteer Haazrah*, I. L. R., 1 Cal 359. See also *Matingee C. Miller v. Moorary Mohun Ghose*, I. L. R., 1 Cal, 175.

the event of the attestation being false, was held by the Privy Council to be too limited a view; wealth being only one element in the position and status of the witness. If he lived in the neighbourhood and was a respectable man and of good character, their Lordships saw no reason why the judge might not properly come to the conclusion that he was a substantial person. (l)

An estate was sold under cl. 2 of s. 8, Reg. VIII of 1819, for arrears of rent due by a patnidar to the Zamindar. Prior to the date of sale, the amount due was paid by the patnidar to an accountant in the Collector's Office, as in satisfaction of the arrears, but no notice was given to the Zamindar or Collector. A suit was afterwards brought to set aside the sale, on the ground that, in consequence of such payment, there was no arrear due at the time of sale. It was held, *per* Norman and Macpherson, J.J., that the suit could not be maintained. *Per* Mitter, J. If the custom of the Collectorate was, as alleged by the plaintiff, for payments in satisfaction so to be made to the Collector's Accountant, the sale ought to be set aside. (l) As a rule, patnidars are bound to deal directly with their Zamindars.

A transfer of his tenure by a patnidar is not binding on the Zamindar, unless made strictly in accordance with the provisions of Bengal Regulation VIII of 1819. (m)

Fifteen years receipt of rent by the purchaser of a patni taluk sold for arrears of rent under Regulation VIII of 1819, has been held to be a waiver on his part of his right to evict the tenant under clause 2 sec. 11 of that Regulation. (n) The Court followed the principle laid down by the Privy Council in the case of *Ranee Surnomoyee v. Maharaja Sutteesh Chunder Roy*.

(l) *Ram Sabul Bose v. Monmohini Dosser*, 23 W. R., 113 See *post*, 182

(l) *Krishna Mohan Shaha v. Munshi Aftabuddin Mahomed*, 8 B. L. R. 134.

(m) *Watson v. The Collector of Rajshye*, 18 M. L. A. 160; S. C. 3 B. L. R., P. C., 48. Pandit's P. C. J. Vol. II, 500 [ante p. 145]

(n) *Woomanash Roy Chowdhary v. Raghoonath Mitter*, 5 W. R., 64. See

An auction-sale, under Ben. Reg. VIII of 1819, of the rights of patnidars in a patni-taluk, by the Zamindar for the arrears of rent, was set aside by the Zillah Court for informality in the notices under that Regulation, and the patnidars who had been dispossessed, restored, with mesne profits to be paid by the purchaser, during the time they were out of possession. The Zamindar then brought a suit against the patnidars under Act No. X of 1859, to recover the arrears of rent which had accrued before and during the time they were out of possession. The High Court decided that the suit, not being brought within three years from the time the rent first became due, was barred by sec. 32 of Act No. X of 1859. Such finding reversed on appeal; the Judicial Committee holding, that the cause of action accrued at the date of the decree reversing the auction-sale, and that the suit having been brought within three years from the date of that decree, the time had not by Act No. XIV of 1859, run out. (o)

A registered dar-patnidar is liable for the rent to the patnidar, though the former has sold his tenure to another person not acknowledged by the latter. A payment made by the vendee of the dar-patnidar (who has not obtained registration) to save the patni from sale, is a voluntary payment, and the registered dar-patnidar cannot claim to deduct the amount from the rent due by him to the patnidar. (p)

Under the description "patni-taluk" and "darpatni taluk," it must be *prima facie* intended that the tenure called a patni tenure was tenure transferable by sale, and upon the creation of which it was stipulated by the terms of the engagements interchanged that in case of an arrear occurring, the estate might be brought to sale free from incumbrances. According to the effect of Act X of 1859, s. 105, Reg. VIII of 1819, ss. 8 and 11, and probably also of Reg. I of 1820, the effect of the sale of such a taluk for arrears of rent is to des-

(o) *Mussamat Ranees Surno Moyee v. Shooshee Mohhee Burmonia*, 12 M. I. A., 244; 2 B L R P. C 10; Pandit's P C J. Vol II, 424.

(p) *Lakshenarain Mitter v. Sitanath Ghose*, 1 Ind. Jur., N. S., 317; 6 W. R., Act X Rulings, 8.

trov all encumbrances which have been created by the patnidar, *e. g.*, a daipatni tenure. (q)

In a suit to cancel a sale of a patni tenure under Regulation VIII of 1819, on the ground that the witnesses who attested the due publication of notice were not "substantial persons" within the meaning of sec. 8, clause 2 of the Regulation :— It was held, by the Judicial Committee of the Privy Council (reversing the judgment of the High Court), (i) that the last portion of the clause is merely directory, and omission to comply with those directions does not vitiate the sale, provided the notice is duly served; (r) and (ii) that a "substantial person" does not necessarily mean a wealthy man from whom damages could be recovered by the patnidar, supposing the attestation to be false. Wealth is only an element in the position and *status* of a witness, and the judge in each case must satisfy himself that the witness is a man of respectability resident in the neighbourhood. Where it is proved that the notice of sale has been actually served, the sale is not vitiated merely because one of the witnesses to the notice is held not to be substantial within the meaning of the clause. (s) By the words "three substantial persons residing in the neighbourhood," the Regulation does not make it imperative that the attesting witnesses shall be residents of the village, but may be taken to include men living within a short distance of the cutchery. (t)

It is essential to the validity of a sale, held under Regulation VIII of 1819, of a patni estate for arrears of rent, that the notices of sale prescribed by cl. 2, s. 8 of the Regulation should have been all duly and regularly published as therein directed. (u)

Effect of Non-compliance with the Provisions of Reg. VIII of 1819, suit to set aside the sale.

(q) *Brindabun Chunder Sircar Chowdhry v. Brindabun Chunder Dey Chowdhry*, L. R. 1 I. A., 178; 13 B. L. R., 408

(r) *Sona Bibi v. Lal Chand Chowdhry*, 9 W. R., 242. [B. L. R., 394.

(s) *Ram Sabuk Bose v. Monmohini Dossee*, L. R. 2 I. A., 71; 14

(t) *Mohinee Dossee v. Jagadamba Dossee*, W. R., 1864, 382.

(u) *Baibantha Nath Sing v. Maharaja Dhruj Mahatab Chand Bahadur*, 9 B. L. R. 87. In this case the notice of sale was stuck up in the Collector's cutchery, and there was no attempt made by the Zamindar to publish the notification of sale in the Mofussil; and these were held to vitiate the sale.

Regulation
VIII of 1819—
Encumbrances
by defaulting
Tenant

A sale under Regulation VIII of 1819 does not, *ipso facto*, annul all tenures created by the defaulting patnidar, but the purchaser, if he thinks proper, can avoid them. (v)

Where the mortgagee of the patni-taluk pays certain moneys to prevent the sale of such taluk under the Patni Sale Law, and thereby protect his own interest, such payment is not a voluntary one, but constituted a good charge on the property. Such a payment could not be considered a voluntary one even in the case where the mortgagee by a covenant in his mortgage-deed had insured himself against loss by such sale. (w) "It does not appear to us" said Mr. Justice Jackson, "that the circumstance of a mortgagee having provided or attempted to provide some protection to himself would deprive him of the benefit of those equitable considerations for which authority is derived from the decision in the case of *Nagender Chunder Ghose v. Kamini Dossee*." (x)

The purchaser at a patni sale is not empowered to collect rent at a higher rate than was demandable by his predecessor without establishing his right to do so by a regular suit. (y)

In the case of the sale of a patni taluk for arrears of rent, if the cutcherry at which notice on the defaulter is served is an adjacent one, where the business of the defaulting patni is carried on, and is on land belonging to the defaulter, publication at that cutcherry is a sufficient publication. (z)

Where mortgages are released after a patni is granted, the interest does not pass under the patni. (a)

(v) *Madhusudan Kundu v. Ramdhan Ganguli* 3 B. L. R., A. C. 431.

(w) *Mahesh Chunder Banerjee v. Ram Prosonna Chowdhery*, I. L. R., 4 Cal 539. See also *Boustub Churun Bhudro v. Tarz Chand Banerjee*, 11 W. R., 357.

(x) 11 M. I. A., 258.

(y) *Magaram Ojha v. Rajah Nilmones Singh Deb*, 21 W. R., 326.

(z) *Munyasee Ohapiasee v. Srimutty Sibosondari*, 21 W. R., 369.

(a) *Jooria Gasse v. Aboo Khahfa*, 21 W. R., 427.

Looking to the terms of sec. 8, Reg. VIII of 1819, it was an object of the Legislature to provide a sufficient notice to a defaulter before the sale of his tenure, 15 day's time (but not less) being considered sufficient; but without such notice, no sale can be a sale duly held under that law. (b)

Where a Court finds that the notice prescribed in cl. 2, sec. 8, Reg. VIII of 1819, has been duly served, it need not find whether the peon who served the notice complied with all the directions of the Regulation as to what should be done in verification of such service. Omission to comply with those directions does not vitiate a sale under the Regulation, provided the notice is duly served. (c)

Srinath, a proprietor of a taluk, which was about to be sold for arrears of rent, entered into an arrangement with the plaintiff, whereby, in consideration of a share in the purchase, he agreed to use his influence to urge on the sale, and to secure the purchase to the plaintiff. Under this arrangement the plaintiff became the purchaser of the taluk, and the former proprietor obtained a share in the purchase. A suit by the plaintiff to oust the under-tenants was dismissed: the plaintiff took only as a purchaser at an ordinary execution sale, and did not obtain the benefit of sec. 16 of Act VIII of 1865 (B. C.). (d) "We take it to be clear," said Mr. Justice Markby, "that, if a lessor enters into an agreement with another person to get rid of his lessee by means of a fictitious sale and to share the profits of the transaction, that is a fraud as against the lessee. That would be a far stronger case than that of *Khan v. Khan*, (e) where it was held to be gross fraud in a mortgagee to attempt to deprive his mortgagor of his right of redemption by means of a fictitious sale of the property for arrears of revenue. The question therefore is whether there was such an agreement in this case.

(b) *Huronath Gupto v. Juggunnath Roy Chowdhry*, 11 W. R. 87; 9 B. L. R., 89 note

(c) *Sona Bibi v. Lal Chand Chowdhry*, 9 W. R., 242. See also *Pitambar Panda v. Damodur Dass*, 24 W. R., 133

(d) *Brenath Ghose v. Huronath Dutt Chowdhry*, 9 B. L. R. 220.

(e) 5 W. R., P. C. 83; 10 M. L. A., 540.

Now it is quite true, that in the case of *Khun v. Khun*, (f) there was, when the agreement was made, the deliberate design to create the arrear of revenue in order to get the estate sold, whilst in the present case there was an actual arrear of rent for which a decree had been obtained and execution threatened, before any negotiation took place. But then it is found, and we think rightly found, that Srinath had, if not absolute control over the sale, at least a considerable voice in bringing it on or postponing it. Now we are by no means sure that it is not the duty of a lessor, under such circumstances, to do his utmost to postpone the sale, and so to protect the interests of his lessee; that is certainly what an upright and honest man would do under the circumstances; and it is a rule of English law, which seems to be founded on broad principles of equity, which are applicable here also, that an intermediate landlord is bound to protect his own tenant from all paramount claims; see *Graham v. Allsopp* (g). At any rate we cannot doubt that it is a gross fraud in the intermediate landlord to use his influence to urge on a sale for arrears of rent, in order to secure to the purchaser the advantages of such a sale under the Act: the intermediate landlord at the same time bargaining to receive, as a reward for his services, a share in the advantages thereby secured. And if this be a fraud, then to this fraud the plaintiff was a party, and the sale being part of the machinery by which this fraud was effected, we think it ought to be put entirely on one side in considering the question now before us, and that, as between the plaintiff and the defendants, the plaintiff ought to be considered, not as having the rights of an auction-purchaser under Act VIII of 1865 (B. C.), but only as having the rights of a private purchaser. It seems to us that if we were to give the plaintiff a decree in this suit, we should be making the Collector and the Court instruments in the hands of the parties to carry out a gross fraud upon the defendants; a fraud in which we regret to observe more than one person was prepared to assist. It was scarcely denied

(f) 10 M. T. A., 322. See *ante*, p. 159.
 (g) 3 Exchequer Rep., 186; *Jones v. Morris*, *Ibid.*, 742.

arguendo that if a superior landlord, protected by an ordinary clause for forfeiture in case of non-payment of rent, were to enter into a contrivance with his lessee to get rid of the under-tenants by putting the forfeiture in force that would be a fraud on the under-tenants, of which the superior landlord could not take advantage. And it seems to us to make no difference that the right to cancel the under-tenures is given by legislative enactment, and that the right is given, not to the superior landlord, but to the purchaser of the tenure. The fraud in both cases is that of the intermediate tenant, who seeks to destroy his own under-tenants, to which fraud the superior landlord in one case, and the purchaser in the other, has become a party.

"This being so, the plaintiff's suit cannot be maintained. The plaintiff cannot take advantage of his own fraud to oust the defendants, who hold under a valid grant from Srinath and his co-sharers, or their predecessors."

Bengal Regulation VIII of 1819, sec. 11, no doubt gives an express power to sell the tenure free of all encumbrances that may have accrued upon it by the act of the defaulting proprietor, his representatives, or assignees; but the power so given is confined to the case of tenures where the right of selling or bringing to sale for an arrear of rent has been specially reserved by stipulation in the engagements intercharged on the creation of the tenure. The preamble of the Regulation shows the existence of such tenures and treats them as a distinct class. (h)

The defendants, after purchasing a patni-taluk at an auction-sale for arrears of rent under Reg. VIII of 1819, granted a darpatni lease to the plaintiff's (the former dar-patnidars) and received a bonus of Rs. 1,199. The auction-sale being five years afterwards set aside, it was held, that the plaintiffs were entitled to a refund of the bonus, although they had not been dispossessed, but had simply reverted to their former position as dar-patnidars under the former patnidar. "In the absence of any precise rule," observed Mr.

(h) *Per JUDICIAL COMMITTEE in Forbes v. Lutchmeeput Sing*, 10 B. L. R. (P. C.) 152; 17 W. R., 200.

Justice Jackson, "this Court is called upon to apply the principles of equity and good conscience. We find that the transaction between the plaintiffs and the defendants in this case is the direct result and outcome of a previous transaction in which the defendants had paid money, and in which they had been indemnified on the transaction being set aside. We have no doubt that in like manner as they have been indemnified for the loss they ought to be compelled to refund to their grantees, the plaintiffs, the amount paid by them." (i) Of sec. 14, cl 1, Reg. VIII of 1819,* the same learned Judge remarked: "The section does not so much declare that the purchaser, whose sale is afterwards set aside, shall be indemnified, as provide for the *precise, immediate and simple* manner in which that is to be done, by directing that he shall be made a party to the suit for setting aside the sale, and that the decree by which the sale is set aside shall contain a provision for his being indemnified" (j)

(i) *Turachand Biswas v. Ram Gobind Chowdhury*, I. L. R., 4 Cal., 778—82

(j) *Ibid* at p. 782.

* SEC 14, CL 1, REG VIII OF 1819

Should the balance claimed by a Zamindar, on account of the rent of any under-tenure, remain unpaid upon the day fixed for the sale of the tenure, the sale shall be made without reserve, in the manner provided for in Sections ix. and x. of this Regulation; nor shall it be stayed or postponed on any account, unless the amount of the demand be lodged. It shall, however, be competent to any party desirous of contesting the right of the Zamindar to make the sale, whether on the ground of there having been no balance due, or on any other ground, to sue the Zamindar for the reversal of the same, and upon establishing a sufficient plea, to obtain a decree with full costs and damages. The purchaser shall be made a party in such suits, and upon decree passing for reversal of the sale, the Court shall be careful to indemnify him against all loss, at the charge of the Zamindar or person at whose suit the sale may have been made.

Sale not to be stayed except the arrear claimed be lodged. But action to lie for its reversal.

Section 3—(A) Sheriff's sale in the Presidency-Towns

In a sale of immovable property made by a Civil Court in execution of a decree, there is no implied warranty by the execution-creditor of the title of the judgment debtor—the maxim "*Caveat Emptor*" applying. (k) The Sheriff has no authority to sell anything but that which the debtor has, *beneficially* as well as *legally*; and therefore every purchaser knows (for he must be presumed to know) the law, that he buys *subject to undisclosed equities*. The purchaser at a Sheriff's sale cannot, in any case, claim the immunities of an ordinary purchaser for value; who if he acquires the legal estate and no notice actual or constructive be proved against him, purchases a good legal title, whatever dormant equities may afterwards be brought to his notice. (l)

A writ of *fieri facias* issued to the Sheriff authorizes him to seize the property of the execution-debtor which lies within his territorial jurisdiction, and to pass the debtor's title to it without warranting that title to be good. When the property has been so sold under a regular execution, and the purchaser is afterwards evicted under a title paramount to that of the judgment-debtor, he has no remedy against either the Sheriff or the judgment-creditor.

But if the Sheriff acts *ultra vires*, e. g., if he seizes and sells property not within his jurisdiction, he cannot invoke the protection which the law gives him when acting within his jurisdiction, and he stands in the same position as an ordinary person who has sold that which he had no title to sell.

Since there is not in India the difference between real and personal estate which obtain in England, and movable and immovable property there are alike capable of being seized and sold

(k) *Dhendu Mathuradas Nask v. Ramji Valad Hamantak Kakda*, 4 Bom. H. C. Rep., A. C. J., 114.

(l) *Gourmonee Debee v. Reed*, 2 Taylor & Bell's Rep., at pp. 109—10.

under a writ of *fiat facias*, the responsibility of the Sheriff in respect of sale in that country is governed by the law relating to chattels, rather than by that relating to the sale of real estate. A Sheriff who in his official capacity seizes and sells property, undertakes by his conduct that he has legal authority to do so. When from his having acted beyond the territorial jurisdiction of the Court, whose officer he is, the sale becomes inoperative and ineffectual, the purchaser may have a case for relief as against the judgment-creditor who has received the purchase-money, if it should appear that the Sheriff has acted under his authority and by his express directions. (m)

“The purchaser at a Sheriff’s sale,” said the Judicial Committee, “has at best very inadequate means of investigating the title of the judgment-debtor ; all that is sold and bought is the right, title and interest of the judgment-debtor with all its defects ; and the Sheriff who sells, and executes the bill of sale, is never called upon, and, if called upon, would refuse, to execute any covenant of title. The Sheriff, however, if he acts *ultra vires*, cannot invoke the protection which the law gives to him when acting within jurisdiction. He is in the position of an ordinary person who has sold that which he has no title to sell. And it appears to their Lordships that his responsibility in respect of the sale must be governed by the law relating to the sale of chattels, rather than that relating to the sale of real estate. Where the Sheriff acts beyond his territorial jurisdiction, the sale becomes *ipso facto* inoperative and wholly ineffectual.” (n)

In an action of ejectment brought by D. L., the rightful owner, against B. K. a purchaser at the Sheriff’s sale of land in Calcutta, the defendant (B. K.) set up a claim by custom to remove the materials of the house erected by him on the premises in dispute. The Court after granting an injunction against the defendant, gave leave to the defendant to bring a

(m) *Dorab Ally Khan v. The Executor of Khajah Moheesooddeen* I. L. R., 3 Cal., 806, L. R. 5 I. A., 116—29.

(n) *Ibid.*, I. L. R. 3 Cal. at pp 813—14.

suit within two months to establish the custom, and in default of such suit being brought, the injunction was ordered to be made perpetual. (o) Instead of bringing a suit to establish the custom, B. K., upon being ejected on the title by D. L., sued for compensation upon the ground that he had considerably improved the property during his occupancy between the year 1848 the date of his purchase and the year 1864 when he was ejected by D. L. The suit was dismissed, and it was held that a purchaser at a Sheriff's sale is not entitled to compensation under Act XI of 1855, if he had relied solely on the bill of sale. (p)

At a Sheriff's sale, held on the 25th July, 1833, one Templeton bought the right, title, and interest of a Hindu widow in certain land in Calcutta; after passing through several hands the land was purchased by the defendant. Between the possession of Templeton and the defendant, an intermediate holder built a house upon the land. The plaintiff, a reversionary heir to the estate after the widow's death, sued the defendant in 1881 to recover possession of the house and land. The defendant in possession admitted the plaintiff's claim to possession, but contended that she was entitled to be paid a fair price for the buildings, or to remove the materials. It was held (by Garth C. J. and Pontifex J.) that the Full Bench Ruling in the matter of *Takoor Chunder Paramanik* did not apply to the case; that the defendant was neither entitled to compensation, nor to remove the materials; and that the question raised in the suit could not be said to be a question of either succession or inheritance so as to admit of the Hindu law being applied as directed by Geo. III, c. 70, sec. 17,* but that the law applicable to the case was the law of equity and good conscience as administered by the Courts of Equity in England. (q) With reference to the Full

(o) *Doyal Ohand Laha v. Bhoyrubnath Khettry*, Cory Rep. 117.

(p) *Bhoyrub Nath Khettry v. Doyal Ohand Laha*, Bouke's Rep., O. C., 159. See also *Gour Gopal Dutt v. Bissonath Ghose*, Cor. Rep., 41.

(q) *Juggut Mohini Dassee v. Dwarka Nath Bysack*, I. L. R., 8 Cal., 582. See *ante*, pp. 18—19.

* See *ante*, p. 14 footnote.

Bench Ruling in *Thakoor Chunder Paramonik's* case, (r) Sir Richard Garth in delivering his learned judgment in the case said :—"After giving a good deal of attention to the Full Bench judgment, and to the authorities there referred to, I think that the law laid down is not intended specially as a rule of Hindu law. The learned Chief Justice, it is true, quotes certain Hindu authorities relating to the law of landlord and tenant and joint proprietorship, but he also in support of his conclusion relies upon the Muhammadan law and the Civil law, as well as upon Act XI of 1855 of the Indian Legislature.

"It seems to me, therefore, that the Full Bench rather intended to deduce from these various authorities a rule of equity and good conscience to be generally observed in the Mofussil ; and in the Mofussil probably, even in the present day, such a rule would work equitably. The sort of houses that are generally found there are, for the most part, readily removable ; and cutcha or semi-cutcha buildings, such as are erected by the poorer native population, have always been considered as in the nature of movable property.

"But in Calcutta the case is very different. The Full Bench Ruling, if generally applied there, would be productive of great inconvenience ; and moreover, we are bound in Calcutta according to the express language of the Charter, not by the law of equity and good conscience which prevails in the Mofussil, but by the law of equity and good conscience which was administered by the Supreme Court (see ss. 19, 20, and 21 of the Charter of 1865). That law, I consider, is generally speaking, the self-same law of equity which is administered in our Courts in England. We are bound of course, in suits between Hindus, to pay all due regard to any Hindu law or usage which can be shown to prevail in Calcutta ; but in this particular case, no attempt has been made to establish any such law or custom, nor has a single authority been cited before us, which, in my opinion, justifies in any degree the appellant's contention. We have no proof whatever as to where, or by whom,

the house in question was built ; but the builder must have claimed under Templeton, and must be taken to have known perfectly well the limited nature of Templeton's estate. Had Templeton himself built the house, it is clear that, upon the widow's death, he would have had no right to remove it ; and it is difficult to see how any one claiming under Templeton could have had a larger right than he had.

"I confess that I see no equity, but on the contrary a vast deal of injustice, in allowing a tenant-for-life to build upon a property in such sort as to ruin a reversioner if he were compelled to purchase the buildings, or, as an alternative, to deprive him of the use of his land during the many months which might be occupied by the representatives of the tenant-for-life in pulling down the buildings and removing the materials. What might be a very just law in the Mofussil, would operate in large towns as a monstrous evil ; and I believe that if the appellant's contention were well founded, the consequences in Calcutta would be most disastrous." (s) Mr. Justice Pontifex added :—"The plaintiff is entitled to have this case decided on the footing that Templeton, the purchaser at the Sheriff's sale, was aware he was buying only the qualified interest of a Hindu widow. And that being so, the fact that Templeton, or any one claiming through him, built on the land would not, in my opinion, apart from any question of Hindu law, give him or them an equity entitling him or them as against the reversioner to remove the materials.

"It has been argued that this is a question of 'succession,' and must, under 21 Geo. III, c. 70, s. 17, be governed by Hindu law. It appears to me, however, that it is not a question of succession or inheritance.

"The defendant in fact admits that the plaintiff is entitled to succeed to the house, subject only to a right in the defendant to be compensated, which right does not accrue to the defendant until after the moment of succession. The right to compensation, or the alternative right to take away the materials, if such

(s) L. L. R., 8 Cal., 589-91. See however *ante*, pp. 18-19.

rights existed, would not to my mind be rights of succession or inheritance. And it has not been shown that such rights exist in Hindu law except in the case of contracts for tenancies where rent is paid. The statement of Nārada referred to in the Full Bench case of *Thakoor Chunder Paramanik (t)* is confined to that state of circumstances. Nor does that Full Bench case deal with the equity as a provision of Hindu law, but, as it appears to me, decides it as a rule of equity and good conscience applicable to the particular case, the property being in the Mofussil and the rule of equity and good conscience being the rule applicable.

“Nor would it necessarily follow that what might be a rule of equity and good conscience applicable to the country, would be equally applicable to Calcutta or a town. It would indeed be difficult to apply a rule like this to a town, and as the rule in Nārada does not include the present case, I think it would be improper to extend it to that which the defendant only claims to be an analogous case.

“We must, therefore, deal with the question according to the usual equities applicable to cases in Calcutta,—namely, equities administered by an English Court of Equity. And especially in this case the defendant, claiming as he does through Templeton, a European, can, I think, claim no greater or other equity than Templeton himself would have been entitled to claim.” (u) Mr. Justice Pontifex in this case expressed his opinion *arguendo* that the Full Bench case does not apply to a person who knowingly builds on lands belonging to another. (v)

The members of a joint Hindu family entered into an agreement not to partition their estate, which was to “continue in one joint undivided occupation as at present.” *Held*, that a purchaser, at a Sheriff’s sale, of the share of one of the contracting parties, was not bound by the agreement. Such an agreement does not prevent a party to it from alienating his interests in the estate. (w)

Agreement not to partition does not bind a Purchaser at Sheriff’s sale.

(t) B. L. R., Sup. Vol., at p. 596.

(u) I. L. R., 8 Cal., 591—92

(v) I. L. R., 8 Cal., at p. 596.

(w) *Anand Chandra Ghose v. Frankisto Dutt*, 3 B. L. R., O. C., 14.

Section 3—(B) Sales in Execution of Money-Decrees.

A mere expectancy or a mere right of suit cannot be attached and sold. the attachment must operate at the time of attachment and not be anticipatory so as to fasten on some future state of property in which the suit may result. (x)

The purchaser at a Court's sale buys only the existing right, title and interest of the judgment-debtor, and, therefore, ordinarily takes subject to the prior right, contingent on confirmation of a former purchaser, though such former purchase be confirmed but subsequently to his own. It is questionable, however, whether the case might not be different, if the delay in the confirmation of the former purchase were accompanied by great laches on the part of the first purchaser or by other special circumstances. (y)

In case of execution-sales under sec. 287 of the Civil Procedure Code (Act X of 1877), notice is given to purchasers that the sale extends only to the right, title and interest of the judgment-debtor, and that the Court ordering the sale does not warrant title. This being so, it seems clear that a person who buys an avowedly doubtful title, and pays for it on that understanding, cannot claim to be a purchaser without notice. (z)

A voluntary private sale by a joint co-sharer under the Mitâksharâ School without the consent of his fellows, was inoperative. But a sale in execution of a decree of the right, title and interest of such co-sharer is a sale *in invitum* against his wishes; and therefore a joint right is affected by a sale in execution of a decree; though not by a private sale without necessity. (a)

(x) *Syed Tuffazul Hossein Khan v Raghunath Prasad*, 7 B. L. R., P. C., 186. See also sec 266, cl. (k), Act XIV of 1882.

(y) *Konapa v. Janardan*, 11 Bom. H. C. Rep., 193

(z) *Per MELVILL J. in Sobhag Chand Golab Chand v. Bhai Chand*, 1 L. R., 6 Bom., 194.

(a) *Oodhun Misser v. Hoobdar Sing*, 1 N. W. P. H. C. Rep., 271.

Under Hindu law, where there is found to be an ancestral debt, and a sale is effected to pay it, the purchaser at such sale is not bound to inquire whether the debt could have been met from other sources. (b) A purchaser under an execution is not bound to go back beyond the decree to ascertain whether the Court was right in giving the decree, or having given it, in putting up the property for sale under an execution upon it, (c) for a judgment-debt is *prima facie* proof of necessity. (d)

The rights and proprietary and mokarari title and share of a Hindu father in the joint family estate under Mitāksharā law having been seized and sold in execution of a decree against him, possession of the whole estate was delivered to the Appellant as purchaser.

In a suit by the Respondent, the son of the judgment-debtor, to recover the same on the ground that it could not be sold in execution without proof of legal necessity for the debt :— It was held, assuming that a member of a Mitāksharā joint family may not dispose of his share in the joint estate by voluntary conveyance without the concurrence of his co-parceners, that the Appellant, as purchaser at an execution-sale of such share, was entitled to ascertain the same by such partition as the judgment-debtor might have compelled before the alienation of his share took place. (e)

The sale of the right, title and interest of a father in ancestral property, in execution of a decree for a debt incurred by him, passes as well as the right, title and interest of the son, where the debt was not incurred for an immoral purpose, and where the purchaser has enquired whether there was a decree against the father, that the property was properly liable to process and

(b) *Ajei Ram v. Girdhars*, 4 N. W. P., H. C. Rep., 110.
 (c) *Muddun Thakoor v. Kanto Lal*, L. R. 1 I. A., 354; S. C. 14 B. L. R., 187, 199.
 (d) *Luchmi Dai Koori v. Asman Singh*, I. L. R. 2 Cal. 213; *Venkataramayyan v. Venkatasubramania Dikshatur*, I. L. R. 1 Mad., 358; *Bika Singh v. Luchman Singh*, I. L. R. 2 All., 800. [4 I. A., 247.
 (e) *Deendyal Lal v. Jugdeop Narain Singh*, I. L. R., 3 Cal. 198; L. R.

sale in satisfaction of the decree, and has purchased the estate *bonâ fide*, under the execution, and *bonâ fide* paid a valuable consideration for it. In the case of *Mudun Thakoor v. Kantoo Lal* their Lordships of the Privy Council thus laid down the position of a *bonâ fide* purchaser at an execution-sale of joint ancestral property :—"A purchaser under an execution is surely not bound to get back beyond the decree to ascertain whether the Court was right in giving the decree, or, having given it, in putting up the property for sale under an execution upon it. If the decree was a proper one, the interest of the sons, as well as the interest of the father, in the property, although it was ancestral, were liable for the payment of the father's debts."

In determining whether the sale passed the right, title and interest of the son, the nature of the debt and not the nature of the property must be considered. Unless it can be shown that the debt was incurred for an immoral purpose, the question as to the nature of the debt must be held to be determined against the son by there having been a decree against the father, and his right, title and interest in the family property. (f)

In the Madras Presidency, where ancestral property has been bought at a sale in execution of a decree against the father of a Hindu family, the purchaser is not bound to go further back than to see that there was a decree against the father, and that the property was liable to satisfy the decree if the decree had been properly given against the father. A *bonâ fide* purchaser for valuable consideration of an estate purchased in execution of a decree against the father under such circumstances is protected against the suit of the sons seeking to set aside all that has been done under the decree and execution, and to recover back the estate as part of ancestral property. (g)

In the Madras Presidency a sale of ancestral land by an undivided Hindu father to procure funds for the satisfaction of

(f) *Pandit Hast Ram v. Musammat Mulu*, 7 N. W. P. H. C. R., 110-11.

(g) *Siva Sankara Mudali v. Parvati Ammi*, I. L. R. 4 Mad., 96, F. B.

debts incurred by himself must be sustained as against the sons on the authority of the decisions of the Judicial Committee of the Privy Council in *Girdhari Lal v. Kantoo Lal* (h) ; but when the sale is also disputed by a (minor) co-parcener, not a son but a nephew (the sale-deed having been executed by his uncle and his mother as *de facto* guardians), the ruling in *Girdharee Lal's* case is not applicable, and the purchaser must show, in addition to the fact, that the debts existed at the time of the sale, that the debts were such as it was incumbent on the minor to discharge. (i)

The execution purchaser, in a mere civil suit of Government for money, acquires none of the extraordinary rights of a purchaser at a revenue-sale. He takes merely the right, title and interest of the judgment-debtor, and, therefore subject to whatever subsisting interests in the lands had been effectually granted or created by any former Zamindar. (j)

One C died indebted, while a suit was pending against him to recover the amount of a bond. The decree, therefore, was passed against his nephew and heir M, who claiming under a will, had taken possession of the deceased's property, and obtained certificate to administer the estate. Execution was taken out, and the property in dispute was attached by the judgment-creditor in Sraban 1268. In the course of the same year, another execution was taken out in pursuance of a second decree in another suit by a different party against M and his two brothers for a *personal* debt, and the property was re-attached in Aughran 1268. In Magh of the same year the rights and interests of these judgment-debtors were sold and purchased by the defendant. Subsequently, the property was sold and purchased by the plaintiff in Cheyt 1268 in execution of the first mentioned decree against the heir M for the debt of his ancestor. It was held that the prior sale in execution of the

(h) L. R., 1 I. A., 321 ; 14 B. L. R., 187.

(i) *Gangulu v. Ancha Bopulu*, I. L. R., 4 Mad., 73.

(j) *Babu Dhurpat Singh v. Geoman Singh*, 11 M. I. A., 433.

second decree could give the purchaser no preferential right in the property over the subsequent purchaser in execution of the first decree. The Court observed :—“ *By Hindu law a man's property is liable for his debts, and property descends to an heir burdened with the debts of the ancestor, which must all be satisfied before the heir can be said to have any interest in the property at all.* Both decrees referred to in this case were given against M, but with this essential difference, that in the first, under which the plaintiff purchased, M was the representative of his uncle C, and the property was sold for this debt of C, for which it was legally liable, and which liability it was necessary to satisfy before any right in the property accrued to M. The second decree was for the personal debt of M, and the rights and interests of M in the property were sold to satisfy that debt. But his rights and interests amounted to nothing, so long as the debt of C remained unsatisfied, and in purchasing the rights and interests of M, the defendant purchased nothing but a bag of wind. No doubt he might, at the time of the second sale, have paid C's debt; but failing to do so, the fact of his sale being prior in time, cannot give him a preferential right to the property, or enable him to keep out the plaintiff—auction-purchaser, who has really purchased the rights and interests of C, for whose debt the property was primarily liable.” (k)

A, a Muhammadan, died, being indebted to B in a sum of money. B sued the heirs of A for the amount, and obtained a decree against them for the amount due, to be realised out of the estate of the deceased. Before B obtained his decree, the heirs of A had mortgaged the estate of A to C. The property was put up to sale in execution of B's decree, and B became the purchaser; and now sued to obtain possession from C. It was held that the mere fact of the property having once belonged to the estate of A did not entitle B to follow it in the hands of C so as to enable him to recover possession without redeeming. The heir of a Muhammadan may, as executor, sell a portion of the estate of the deceased, if necessary, for the

(k) *Gunga Narain Paul v. Unesh Chunder Bose*, W R., 1864, 277.

payment of debts or legacies in the course of a due administration of the estate; and such sale will not be set aside, if the purchaser acted *bonâ fide*. (1) "It is quite true," said Mr. Justice Macpherson, 'that the assets of a deceased Muhammadan are primarily liable for and charged with his debts; and further, that it is the duty of the heir to pay all debts before appropriating any portion of the assets to his own use. But although that is unquestionably so, it does not follow that a third party who purchases from the heir *bonâ fide*, and for full consideration, may not by his purchase acquire a good title as against a creditor who subsequently gets a decree against the heirs and estate of the deceased. As regards Hindus, it has been decided that the creditor of a deceased man has no better position as against his debtor's estate than that which he enjoyed in his life-time: that when the estate has passed to the heirs of the debtor, the creditor may have recourse to it, so long as it remains in their hands; but that if he allows the heirs to dispose of the estate to a *bonâ fide* purchaser, he cannot follow it in the hands of the latter, but can proceed only against the heirs personally, who are responsible to the extent of the assets. See *Zabardast Khan v. Indurman* (m)

"In Baillie's Muhammadan Law, page 677, it is said:— 'But if there are debts, and they cover the whole of the estate, the executor may sell the whole by general agreement (i. e. of the heirs), and when the debts do not cover the whole estate, he may sell as much of it as may be necessary for their payment.' * * * When, however, he 'has actually sold *akâr*, or immovable property, for the payment of debts, while he has other property in his hands sufficient for that purpose, the sale is lawful; and if there are general legacies, the executor may sell as much of the property as may be necessary for their liquidation, &c.'

The law being such, there is nothing *primâ facie* bad in a sale by a Muhammadan heir,—nothing which should invalidate

(1) *Syed Shah Enayet Hossein v. Syed Ramzan Ali*, 1 B. L. R., A. C., 172.
(m) *Agra H. C. Rep.*, (F. B. R.), 71. See ante pp 63—65, 73—74.

the title of a *bonâ fide* purchaser who pays full consideration, and buys without notice, if there be any reason why the sale should not have been made; of course if the purchaser is not buying *bonâ fide*, if he is in any way acting in collusion with the heir, and knows, or has reason to believe, that the money paid by him will not be duly applied for the purpose of the estate, the purchase would be liable to be set aside."

After the death of a Muhammadan, several of his creditors sued his widow and daughter, and obtained decrees against the assets of the deceased, which assets had come into the possession of the mother and daughter. In execution of these decrees portions of the property were sold; thereupon two married sisters of the deceased, who lived with their husbands apart from the widow and daughter, sued as heirs of the deceased to recover their share of the property sold. It was held that the property of the deceased having been attached and sold in payment of his debts, the plaintiffs' suit must be dismissed. When a creditor of a deceased Muhammadan sues the heir in possession, and obtains a decree against the assets of the deceased, such a suit is to be looked upon as an administration-suit, and those heirs of the deceased who have not been made parties cannot, in the absence of fraud, claim anything but what remains after the debts of the testator have been paid. (n)

K, the plaintiff, purchased a house from H on 16th March 1870, and conveyed it to his wife by deed of gift on the 1st October following. In execution of a decree obtained by G, the defendant, in 1869, against H, the property was attached. K's wife objected under sec. 246 of Act VIII of 1859, but her objection was disallowed, and the rights and interests of H in the property were sold and purchased by K. K's wife sued to have the sale set aside and obtained a decree and possession of the house. K, then sued G to recover the money paid by him an auction-purchaser under G's decree. Held, that the principle of *caveat emptor* applied, and the defendant was not responsible for the plaintiff's mistake

(n) *Mutty Jan & others v. Ahmed Ally & others*, L. L. R. 8 Cal., 370.

in purchasing and paying his money for the house, without enquiring into, or considering the title to it. (o)

A purchase by a member of a Hindu joint family with the joint funds is a purchase on account of the joint family, and property so bought may be taken in execution for a joint family debt.

Hindu law as to purchase with joint funds—Execution.

In execution proceedings the Court will look at the substance of the transaction, and will not be disposed to set aside an execution upon mere technical grounds when they find that it is substantially right. (p)

A sale-certificate which in express terms passes to the purchaser the rights and interests of a father, does not necessarily transfer to him the interests of his minor sons. But if the minor sons have benefited to any extent by the decree or by the sale in execution of that decree, to that extent, the purchaser has an equitable claim against the minor sons. Mr. Justice Markby in laying down this equitable rule of law, made the following observations with reference to the case in which the point arose :—"It is admitted that the sons took a vested right in the property at their birth, but it is said that, as the debt for which the decree was passed was a charge on the estate, the execution-sale passed to the purchaser the rights and interests both of the father and the sons, because it was a debt which the sons were bound to discharge. It is said that this was the same thing as if the father had made a private alienation of the property to meet the necessary expenses and debts of the family which both he and the sons were bound to discharge. These arguments no doubt are well-founded in some respects, but the real question which we have to consider is the true construction of the sale-proceedings. It may well be that a father has a right to deal to some extent with the interests of his minor sons, as well as his own, but it does not follow from that, that a

(o) *W. M. Kelly v. Seth Gobind Das*, 6 N. W. P. H. C. Rep., 168.
(p) *Bissessur Lall Sahoo v. Maharajah Luckmessur Singh*, L. R., 6 I. A., 233

conveyance by him of his own rights must necessarily pass the rights of his son also. So it may be that, had the decree-holder in this case sought to bring to sale not only the rights and interests of the father but the whole interests of the family, the sale would have been a good sale of the whole property. But what we have to consider is the true construction of the sale-proceedings; and I am of opinion that under it the rights and interests of the father only passed to the purchaser, and I see no reason to hold, nor has any case been quoted to show that we ought to hold, that, when a sale-certificate in express terms passes to the purchaser the rights and interests of the father, it transfers to him not the interests of the father alone, but also of his minor sons." (q)

A Judge has no right to set aside a sale under a decree, upon the application of a third person, who is not a party to the suit and in no way connected with the original proceedings. (r)

A sale under a decree to a *bond fide* purchaser is valid, notwithstanding the decree may be reversed upon appeal, and it seems to follow that a *bond fide* sale under a decree which is afterwards set aside upon review is equally binding. (s) The authorities cited by Mr. Justice Norman in *Surma v. Surma* fully bear out this proposition of law. A purchased a share of B's taluk at an auction-sale, in execution of an *ex-parte* decree obtained against B, under sec. 105 of Act X of 1859. B obtained leave under sec. 58 of Act X of 1859 to revive the suit, and succeeded in getting it dismissed. He now sued to set aside the sale to A. It was held, that the sale to A was binding against B, notwithstanding that the decree in execution of which it had taken place had been set aside in review, provided the sale was *bond fide*. (t) "There were," said Barnes Peacock in this case, "two kinds of execution in England, one a writ of *elegit*, under which property was delivered to the execution creditor, in order that he might

(q) *Sirdar Dyal Singh v. Baboo Ram Buddun Singh*, 17 W. R., 454.

(r) *Hanulhone Shamonto v. Goluck Chunder Shamonto*, 25 W. R., 79.

(s) *Chunderkunt Surma v. Bisessur Surma Chuckerbutty*, 7 W. R., 312.

(t) *Jan Ali v. Jan Ali Chowdhry*, 1 B. L. R. A. C., 56-61; ante p. 177.

satisfy his judgment by collecting the rents of the estate ; and the other writ of *feri facias*, under which the Sheriff was directed to levy the amount by seizure and sale of the defendant's goods and chattels. In the case of a sale under a writ of *feri facias*, it was held by the Court of Common pleas, and affirmed in error by the Court of King's Bench, after several arguments, that the sale to a *bond fide* purchaser, under a decree, was not affected by a subsequent reversal of the decree. But the delivery to the judgment-creditor under an *elegit*, is different, and it was held that the reversal of the judgment put an end to the plaintiff's title under the *elegit*. There is a good ground for the distinction, and as it is important to advert to the distinction, we think it right to refer to the reasons which were given by the Courts in each of the two cases.

"One of these cases is *Mathew Manning's case*. (u) It was resolved in that case, that the sale by the Sheriff by force of the *feri facias* should stand, although the judgment was afterwards reversed, and that the plaintiff in the writ of error should be merely restored to the value, for the Sheriff, who made the sale, had lawful authority to the sell, and by the sale the vendee had an absolute property in the chattel purchased ; and although the judgment, which was the warrant of the *feri facias*, was afterwards reversed, yet the sale, which was a collateral act done by the Sheriff by force of the *feri facias* should not be avoided ; for the judgment was that the plaintiff should recover his debt, and the *feri facies* was to levy it of the defendant's goods and chattels, by force of which the Sheriff sold the chattel as he well might, and the vendee paid money to the value of it.

"It was remarked, that if the sale of the chattel should be avoided, the vendee would lose his chattel, and his money too ; and, therefore, great inconvenience would follow, that none would buy of the Sheriff goods or chattels in such cases, and so execution of judgments (which is the life of the law in such case) would not be done.

(u) 4 Coke's Report, Pt. 8, p. 94. See however *ante*, p. 137, (c).

"The other case, to which reference is made by Mr. Justice Norman, is that of *Goodyere v. Ince*. (v) The Court there held that there was a difference 'between the sale and delivery upon an *elegit* to the party him-self, and a sale to a stranger upon a *pieri facias*; for the *pieri facias* gives authority to the Sheriff to sell and to bring the money into Court, wherefore when he sells a term to a stranger, although the execution be reversed, yet he shall not, by virtue thereof, be restored to the term, but to the monies, because he comes duly thereto by act in law. But the sale and delivery of the lease to the party him-self upon an *elegit*, is no sale by force of the writ, which being reversed, the party shall be restored to the term itself.'

"We think that the distinction is founded upon reason and good sense, and that our decision must be in accordance with these authorities. It is, therefore, necessary to decide whether the purchaser, under the execution, was a *bond fide* purchaser; or whether, as alleged in the plaint, he was in collusion with the ijârâdâr, the plaintiff in the revenue-suit.

"The Court of first instance considered, that as the decree had been set aside, the plaintiff was entitled to succeed in this suit, whether there was fraud between the ijârâdâr and the purchaser under the decree or not; and he did not raise or try any issue as to whether there was any collusion or fraud. The Judge did try that question, but he tried it upon the evidence as it stood in the lower Court, and neither of the parties, therefore, had an opportunity of calling witnesses upon that issue.

"The main points, upon which the Judge has found that there was fraud between the ijârâdâr and the auction-purchaser, are, *first*, that enmity existed between the purchaser and the plaintiff, *secondly*, that Bhairab Obandra, the naib of the ijârâdâr was present at the sale; *thirdly*, the inadequacy of the price realized; and *fourthly*, the ignorance in which the plaintiff was kept of the intended sale. I by no means intend to say that the Judge arrived at an erroneous conclusion of fact, but I think

(v) 3 Cioke's Rep., 246.

there was not in strictness any legal evidence to warrant it. The case ought to be remanded, in order that the question of fraud and collusion between the auction-purchaser and the plaintiff in the decree may be tried. The case should go to the Judge, in order that he may send it to the Moonsiff under sec. 354 of Act VIII of 1859, to try whether such fraud or collusion existed, to return his finding, together with the evidence, to the Judge, for final decision. Either party should be at liberty to adduce any evidence he may think fit upon the trial of that issue, and we think that the Moonsiff ought to be directed to summon all the parties to this suit, that is to say, the ijâ'âdâr, his naib and the auction-purchaser ; and, as it is suggested that there was collusion between the plaintiff and the ijâ'âdâr, we think the plaintiff should also be summoned and examined.

“It does not appear what was done with the purchase-money paid by the auction-purchaser, whether any, and if any, what portion of it was paid out to the plaintiff in the rent-suit, or to the defendant in that suit, and whether the auction-purchaser has ever obtained possession of what he purchased, or taken any and what steps for that purpose ; or whether the plaintiff in this suit, or the ijâ'âdâr, or the auction-purchaser, has been in possession since the auction-purchase. We think those points must be inquired into by the Moonsiff when the case goes back to him on remand from the Judge, as they have a material bearing upon the question of fraud.”

No officer having any duty to perform in connection with any sale in-execution of a decree under the Code of Civil Procedure shall either directly or indirectly bid for, acquire, or attempt to acquire, any interest, in any property sold at such sale. (w)

Section 317 of the Code of Civil Procedure 1882 provides

Bar to suit
against the cer-
tified purchaser
(benamidar).

that no suit shall be maintained against the certified purchaser on the ground that the purchase was made on behalf of any other person, or on

(w) Act XIV of 1882, sec 292.

behalf of some one through whom such other person claims. Nothing in this section shall bar a suit to obtain a declaration that the name of the certified purchaser was inserted in the certificate fraudulently or without the consent of the real purchaser. (x)

C, a Hindu, inherited from his father property charged, Sale of right, title and interest of a Hindu widow. under the Mitāksharâ law, with the maintenance of N, his mother. C dying without issue, his property passed to D, his widow, who allowed the maintenance of N to fall into arrears. N brought a suit against D personally for the amount of the arrears, and obtained a money-decree, in execution of which D's right, title and interest in the property left by her husband were sold. Neither the decree nor the sale-proceedings declared the property itself to be liable for the debt. In a suit by the reversionary heir of C, after the death of D, to establish his right of inheritance to, and to recover possession of, C's estate, *Held*, that the purchaser at the execution-sale took only the widow's interest, and not the absolute estate, and therefore the plaintiff was entitled to recover. (y)

J and N borrowed money from P, and, as security, N Execution-sale under erroneous decree—Reversal of decree—Rights of purchaser. pledged certain landed property. P sued on his bond, and obtained a decree against J and the representatives of N. He then transferred his decree to C and F, who, in execution, seized property belonging separately to J, who, to protect her own property, paid the whole debt, and then brought a suit against N for contribution. Having obtained a decree, J attached the property originally mortgaged by N, claiming over it something equivalent to a mortgage-lien. Upon this one Nilkant claimed the property as purchaser from N, and succeeded in getting the attachment taken off. Thereupon J brought a suit against Nilkant, N, and others, to have it declared that the mortgage to

(x) Act XIV of 1882, sec. 317.

(y) *Baijun Doobey v. Brijbhokan Lall Awasthi*, I. L. R., 1 Cal, 132. See as to construction of sale-certificate, *ante*, p. 202, (q).

P had become assigned to her as a consequence of her having paid off the debt due to P. Her suit was dismissed in the first Court; but she obtained a decree in the second Court, under which she sold the property to R, while a special appeal was pending, the result whereof was to set aside the decree: It was held, that, under the execution-sale, R bought the rights and interests, not of Nilkant, but of N; and as the result of the special appeal was to declare that there were no rights and interests of N in the property, R bought what was worthless. (c)

The purchaser at an execution-sale of the Malikee right of a judgment-debtor is entitled to possession where such right has been in no way pledged or mortgaged, notwithstanding a deed of assignment from the previous owner directing his tenant to make an annual payment to a creditor of interest due under a bond. (a)

Award in fraud of decree—auction purchaser. The locum-tenens of a purchaser at a sale in execution of a decree is not bound by an award in fraud of the decree to which the judgment-debtors were parties. (b)

The title of a purchaser at a judicial sale which has been confirmed and been made absolute relates back to and takes effect from the date of the sale and does not commence only on the date of the confirmation of the sale. (c)

It is not incumbent on a person seeking, not to interfere with the sale in execution of a decree of the right, title and interest of the judgment-debtor but to recover what has been taken in excess under colour of sale, to sue within the period of limitation prescribed by law for a suit to set aside the sale. The mere circumstance that there is a specification of the subject of the sale at the time of sale is of no force. It was not the pro-

(a) *Ram Suhai Singh v Chutter Koor*, 22 W. R., 452.

(a) *Meer Gourhar Ali v. Harpal Bhugul*, 22 W. R., 445.

(b) *Alfatun v. Rao Karam Singh*, 7 N. W. P. H. C. Rep., 362.

(c) *Raja Luchmin Nath v. Maharaja of Vizianagram*, 7 N. W. P. H. C., 310. See also *Kalee Dass Neogee v. Hironath Roy Chowdhry*, W. R., 1864, Gap No., 279; *Bhyrub Chunder Bundopadhyaya v. Soudamini Dabee*, I. L. B., 2 Cal., 141 (F B.)

perty specified but the right of the judgment-debtor therein that is offered for sale and conveyed. (d)

At a sale held on the 9th of September, 1872, in execution of a decree, the Respondent purchased an estate for Rs. 550,000. The notification of sale had stated the Government revenue to be Rs. 8146 instead of Rs. 8146 ; the sale being fixed for the 5th of August, 1872. The sale was postponed without the issue of a second notification on an application by the judgment-debtor praying for such postponement, the attachment and the notification of sale being maintained.

On the 1st of October, 1872, the judgment-debtor objected, under sec. 256 of Act VIII of 1859, to the sale on the ground of material error in the above notification in regard to the amount of Government revenue. The subordinate Judge overruled such objection, but omitted to pass an order under sec. 257 confirming the sale. Thereupon the judgment-debtor paid into Court the amount of the decree, and then obtained from the judge an order purporting to have been made in review under sec. 376, but without notice to the Respondent, setting aside the sale on the ground of inadequacy of price and the above alleged material error. Subsequently the Judge refused to confirm the sale and to issue a certificate to the Respondent.

The High Court, upon application by the Respondent under 24 and 25 Vict. c. 104, sec. 15, held that the objections made were insufficient, and directed the Judge to confirm the sale ;— It was held, by the Privy Council, that, although the alleged inadequacy of price was no ground for refusing to confirm the sale, yet that the above error in specifying the amount of Government-revenue was an irregularity (see sec. 249) for which on proof of substantial injury to the judgment-debtor therefrom the sale might have been set aside ; but that the above petition for postponement amounted to an admission by the judgment-debtor that the notification was correct, or that there was no such irregularity as would be likely to mislead. (e)

(d) *Muhammad Bux v. Muhammad Hossein*, 7 N.W.P.H.C. Rep., 288.

(e) *Guthari Singh v. Hurdoo Narain Singh*, L. R. 3 I. A., 230.

The property of a judgment-debtor was proclaimed and advertised for sale in execution of a decree on a certain day. The proclamation set out particulars of the property, but subsequent to such proclamation a portion of the property was released to a third party. Notwithstanding this fact, no fresh proclamation was made, and the sale took place on the day originally fixed. *Held*, that the omission to issue a fresh proclamation was a material irregularity inasmuch as the judgment-debtor was entitled to have a proclamation issued accurately describing the property to be sold, and that such proclamation should be published *thirty* days before the sale. (f)

Proclamation.
Material Irregularity. Act
VIII of 1859,
ss. 249, 256.

Where a sale in execution a decree is postponed whether indefinitely or to a fixed date, it is necessary, in the absence of an express arrangement between all the parties, that a fresh proclamation should be made giving notice of the day to which the sale has been postponed. It may be presumed, when the notice is wanting, that there has been an absence of bidders, from which alone substantial injury must probably have arisen to the judgment debtor (g) The Law is express on the subject.*

Proclamation
on postponement
of Sale. Act
VIII of 1859,
s. 259.

B R, a Muhammadan, had incurred debts for repairs to a house of which he owned an eight-anna share, and after his death his daughter S who was entitled to a five-anna share of his estate, and who had taken charge of his property and obtained a certificate under Act XXVII of 1860 directed further repairs to be done to the estate. The debts thus incurred by B R and S not having been paid, the creditor brought a suit against S, as representing her father's estate, to recover them, and having obtained a decree, the house was sold in execution thereof, and purchased by H in May 1874. B R at his

Sale in execution of decree against representative of a deceased Muhammadan. Right of a purchaser of share of estate.

(f) *Shib Prakash Singh v. Surdar Doyal Singh*, I L. R. 3 Cal., 544.
(g) *Gopjes Nath Dobey v. Roy Luchmeput Singh Bahadur*, I L. R., 3 Cal., 542. See also *Okhoy Ohunder Dutt v. Erskine* 3 W. R., Mis. R., 11.

* Section 291 of Act XIV of 1882 expressly provides for the issue of a fresh proclamation under sec. 289 thereof, whenever a sale is adjourned for more than seven days.

death left also a sister, who was entitled to a three-anna share of his estate, but who had been for some years absent on a pilgrimage to Mecca. On her return she in January 1874 sold her interest in the house to M. In a suit by M against S and H for possession of the share so purchased by him. *Held*, that S did not represent the whole estate of B R and the share purchased by the plaintiff did not pass under the execution-sale to H ; the plaintiff, therefore, was entitled to recover. (h)

In *Omrao Sing v. Sumbhoo Nath* (i) the plaintiff sued for the sale of certain landed property hypothecated to him in a decree by consent of February 1862. This property was subsequently purchased at a judicial sale in execution by the defendant who alleged the hypothecation to be fraudulent and collusive as the plaintiff and the judgment-debtor thereby sought to protect his property from his creditors and particularly from Sumbhoonath who had previously obtained a decree against him, which remained unsatisfied at the date of the plaintiff's decree declaring his lien on the property. It was contended on behalf of the plaintiff appellant that one who buys at a judicial sale, and who acquires by his purchase the right, title and interest of the defendant in the suit in the property sold, takes the property subject to all incumbrances thereon in fact created by the old proprietor ; that he stands precisely in the position of the latter, and is bound by his acts and deeds. "If this be so," said the Allahabad High Court, "fraudulent charges created by the judgment-debtor on his property for the purpose of defeating or delaying the execution of his judgment-creditor, cannot be set aside after the sale. Such charges may be made secretly, and may be unknown to the judgment-creditor prior to the sale ; and if the only remedy against them is by suit brought by the holder of the decree, it may be feared that great frauds on the part of judgment-debtors will pass unquestioned.

"It appears to us that a purchaser at a judicial sale is in a position different from that of a mere representative of the old

(h) *Henry v. Mutty Lal Dhur*, I. L. R. , 2 Cal., 395.

(i) 2 N. W. P. H. C. Rep., 135.

proprietor, or of one who comes in by a voluntary sale made by the latter. A judicial sale transfers to the purchaser the property of the judgment-debtor against the debtor's will, and places the purchaser in a *higher* position than that which the judgment-debtor by any private alienation could confer on him. Whether a purchaser at judicial sale may challenge all the dealings and transactions of the judgment-debtor in regard to the property which he has purchased, as fully as the execution-creditor before the sale may do, it is not necessary now to determine. But we consider that such a purchaser is competent to defend his possession and title in such a case as the one now before us, by showing, as the decree-holder before the sale might have done, that the charge which it is sought to establish against the estate is fraudulent and collusive, and therefore void.

"It has been held that notwithstanding a prior hypothecation, the owner of land was entitled to mortgage it to a third person ; and that the circumstance that such mortgage was made while proceedings were pending for a sale of the property in execution of a decree obtained by one of his creditors, but before any attachment in execution of the property, did not invalidate the mortgage. The property of a judgment-debtor continues no doubt to be at his disposal until it has been attached ; but any fraudulent disposition by him of his property, in order to defeat or delay execution, may, nevertheless, be questioned and set aside. All alienations after attachment are void. Fraudulent alienations, even if made before attachment, are, we conceive, also liable to be declared void." (j)

The doctrine—that where a person sells property of which he is not the owner, but of which he afterwards becomes the owner, he is bound to make good the sale to the purchaser out of his subsequently acquired interest—does not apply to a case where the sale was made through the Court at the instance of an execution-creditor, and was, therefore, compulsory. (k)

(j) 2 N. W. P. H. C. Rep., at pp. 40 and 41.

(k) *Utuck Money Debee v. Benimadhub Ohuckerbatty*, I.L.R. 4 Cal., 678.

The acts of a minor are only voidable, and not absolutely void. The purchasers of the right, title and interest of a judgment-debtor sued to obtain immediate possession of the property purchased at a sale held in execution of a decree, after setting aside an usufructuary mortgage executed by the judgment-debtor while a minor.

Sale in execution of decree. Usufructuary mortgage. Right of purchaser.

Held, that the sale in execution merely transferred to the purchaser the reversionary right of the judgment-debtor in the property, after the satisfaction of the usufructuary mortgage, and not the right to set aside an act done during minority.

Held also that, until a transaction by a minor was avoided by some distinct act on attaining majority, it must be considered valid. (l)

The introduction of a stranger in blood, as auction-purchaser of a portion of the rights and interests of an undivided Hindu family, breaks up the constitution of such family as undivided, and destroys the character of such property as joint and undivided family property; and a gift subsequently made by the remaining members of the original undivided Hindu family of their rights to a third person, without the assent of the auction-purchaser, is not invalid by reason of the principle of Hindu law which requires the assent of co-parceners in an undivided Hindu family, to give validity to such a gift. (m)

Destruction of character of joint undivided family property by introduction of stranger in blood as auction-purchaser. Assent of co-parceners no longer necessary to constitute valid gift.

In execution of a money-decree, the decree-holder caused the right, title and interest of the judgment-debtor in a certain property, which had been mortgaged to him by a registered bond, to be sold, but without notice of the existence of such lien. He afterwards obtained a decree upon the bond, and sold it to the defendants, who caused the same property to be attached. The purchaser intervened under sec. 246, but without success. On

Notice. Suppression of Fact. Loss of lien.

(l) *Hari Ram v. Jitan Ram*, 3 B. L. R. A. C., 426.

(m) *Babul Das v. Sunder Das*, I. L. R. 1 All., 429.

suit by the purchaser, to establish his absolute right, *hild*, that as the defendants' vendor had suppressed the fact of the charge and thereby induced the plaintiff to purchase as the absolute property of the judgment-debtor, they were now precluded from setting up his lien. (n)

In execution of a decree, the right, title and interest in two parcels of property of a judgment-debtor, who had previous to the attachment executed a simple mortgage thereof to A, was sold; and B and C respectively purchased them at different prices. A sued the mortgagor and purchasers B and C, for enforcing his lien on the two parcels of property. The suit was dismissed by the first Court; but on appeal, the order was "appeal decreed." A entered into a compromise with B, and entered satisfaction of a moiety of the decree. He afterwards issued execution of the other moiety against C, and compelled him to pay. C thereupon sued B for recovery of the proportion of the amount paid by him to A, but which, according to the valuation of the respective properties, should have fallen into the share of B. It was held by the Calcutta High Court, Markby and Kemp, JJ. :—I. That the proper decree in the suit of A against the mortgagor and B and C would have been a money-decree against the mortgagor only, with a declaration that the two properties were liable to be sold, clear of subsequent incumbrances, in satisfaction of the mortgage-bond debt.

II. That debt due upon the mortgage-bond was a general burden upon the two properties, for which no portion of those two properties was more liable than the other.

III. That as between the plaintiff and defendant, the liability was not joint, but several, in proportion to the respective values of the property, and that the plaintiff having been compelled to discharge a burden for which the property of defendant was legally liable, was entitled to recover the amount from the defendant.

(n) *Dullab Sirkar v. Krishna Kumar Bakshi*, 3 B. L. R. A. C., 407.

III. That no arrangement between the decree-holder and one of the judgment-debtors would affect the interest of a co-judgment-debtor, unless by express consent. (o)

On the 21st August 1876, certain immovable property belonging to M was put up for sale and was purchased by R. On the 20th April, 1877, such sale was set aside under sec. 256 of Act VIII of 1859, on the ground that the order attaching such property and the notifications of sale had not, as required by sec. 222, been signed by the Court executing the decree but by the munsarim of the Court. On the 27th June, 1877, M conveyed such property to H, who purchased it *bonâ fide*, and for value, and satisfied the incumbrances existing thereon. On the 15th April, 1878, R sued H and M to have the order setting aside such sale set aside, and to have such sale confirmed in his favour, on the ground that it had been improperly set aside under sec. 256 of Act VIII of 1859, the judgment-debtor not having been prejudiced by the irregularities in respect whereof such sale had been set aside. It was held by Oldfield J., that, although such sale might have been improperly set aside, yet in as much as the order of attachment and the notifications of sale could have no legal effect, having been signed by the munsarim of the Court executing the decree, and not by the Court, as required by sec. 222 of Act VIII of 1859, and inasmuch as it would be inequitable, after the incumbrances on such property had been satisfied and the state of things changed, to allow R, after standing by for a year, and permitting dealings with the property, to come in and take advantage of the change of circumstances and obtain a property become much more valuable at the price he originally offered, R ought not to obtain the relief which he sought. It was held by Straight J., that the fact that the Court executing the decree had not signed the order of attachment and the notifications of sale vitiated the proceedings in execution ab

(o) *Mahesh v. Nadyar Chand Pal*, 3 B. L. R. A. C., 357-58.

initio, and rendered the sale which R desired to have confirmed void, and R's suit therefore failed and had properly been dismissed. (p)

A purchaser of property at a Court sale who fails to pay the deposit (25 per cent on the purchase-money) directed to be paid by sec. 306 of the Civil Procedure Code is a defaulting purchaser within the meaning of sec. 293 of that Code, and liable, as such, to make good any deficiency of price which may happen on a resale, and all expenses attending the same. A sale at which the decree-holder himself, or some other person for him, without the permission of the Court first obtained, becomes the purchaser, is not *ipso facto* void : it is a good sale, unless and until set aside by the Court under the provisions of sec. 294 of the Civil Procedure Code. (q)

One of four children set up a deed of gift and a will, in virtue of which he was, in 1842, placed, by a summary proceeding of the Courts, in possession of the whole estate left by his deceased father. The rights and interests of two other children were subsequently sold in execution of a decree for debt, and purchased by the present plaintiffs. A fourth child instituted a suit against the first mentioned one, to set aside the deed of gift and will, the result of which was that, in 1855, the will, which affected two-thirds of the estate, was set aside as having been made without due consent of heirs, the consent alleged in the will being held to be no consent. The plaintiffs sued in 1859 to get possession of the shares of the two children whose rights and interests they had bought. *Held*, reversing the decision of the High Court, that the plaintiffs as purchasers at an execution-sale, were in no better position than claimants under any other conveyance or assignment, and their cause of action arising in 1842, they were barred by limitation. (r)

(p) *Ram Dial v. Mahtab Singh*, 1 L. R. 3 All., 701—2.

(q) *Jacherbai v. Haribhai*, 1 L. R. 5 Bom., 576.

(r) *Raja Enayet Hossein v. Giridhari Lal*, 2 B. L. R. P. C., 75.

In execution of a decree, A, the judgment-creditor, obtained an order for the attachment of certain property of B, the judgment-debtor, but it was not executed as required by Act VIII of 1859. The property was however advertised for sale, and A obtained an order staying the sale, on a petition by B alleging, that A had agreed to give him time on condition that the attachment should remain good, and declaring that he (B) would not alienate the property, until the whole of the decree was satisfied. Subsequently B mortgaged a portion of the property to C. A assigned his decree to D, upon whose application the property was attached and sold, and E became the purchaser. C having taken steps to foreclose the mortgage, E, to prevent such foreclosure, paid the amount into Court. *Held*, that E could not maintain a suit against C to recover the amount so paid by him. The mortgage by B was not an alienation null and void under sec. 240, Act VIII of 1859. B's petition did not create a charge upon the property in favor of A. (s)

In a suit by a certified purchaser of certain property at a sale in execution of decree to establish his right to the property and for possession thereof, the Court will not apply sec. 260 of Act VIII of 1859 or sec. 317 of Act XIV of 1882 so as to assist the certified purchaser to enforce his claim against the party in possession, by relieving him from the necessity of showing the justice of his claim or excluding enquiry as to its fraudulent character. The defendant in such a suit is not precluded by the law from resisting the suit on the ground that he was the actual purchaser of the property. In *Mt. Buhuns Kowur v. Behari Lal*, (t) the Judicial Committee of the Privy Council held that sec. 260, Act VIII of 1859 should be construed strictly and literally, and was applicable only to a suit brought *against* the certified purchaser to assert the benami title against him, that the Statute did not make benami purchases illegal and that the *real* owner for whom the purchase was made, if in possession,

(s) *Rameswar Sing v. Ramtanu Ghose*, 4 B. L. R. A. C., 24.

(t) 14 M. I. A., 496. See also *Lokhee Narain Chowdhry, v. Kalipado Bandopadhyay*, L. B. 2 I. A., 154.

and if that possession had been honestly obtained, might defend a suit brought by the holder of the certificate and shew that he (the certificate-holder) was the apparent owner only and a mere trustee.^(u) In *Lokhee Narain Roy Chowdhry* (appellant) v. *Kalipuddo Bandoopulhja and Shamapuddo Bandoopulhja* (plaintiffs) the appellant had purchased at an execution-sale in the name of his manager Ishan Chunder, father of the plaintiffs, the life-interest of a Hindu widow *Monmohini Debya* of and in nine-annas of the zamindari called *Kishenpoora* in Cuttack, whereof the appellant held the other seven-annas in his own right and a reversionary interest in the nine that were sold. The plaintiffs, Ishan Chunder's sons, sued to recover possession of the nine-annas share upon the ground that the certificate of purchase was given to Ishan Chunder, and the allegation that the appellant Lokhee Narain had obtained forcible possession of the nine-annas subsequently to the certificate of sale. The appellant's defence was that Ishan Chunder was his manager, that the purchase of the nine-annas was made in his name, and that the appellant was in receipt of the rents and profits thereof. It was held by the Judicial Committee of the Privy Council that the holder of the certificate was a mere trustee. Their Lordships made the following observations with reference to the facts of the case :—" It seems to be a fair conclusion from the evidence that Ishan Chunder had no express instructions previous to the sale from Lokhee Narain to purchase these nine-annas for him. But these facts are proved, that Russool, who was an agent, or acting at that time as an agent of Lokhee Narain, was a bidder for these nine-annas, and had bid Rs. 2,260 for the property. At that stage, when he had given that bidding, which was the last of four, somebody suggested to him that he ought not to bid for the Zamindar, but that Ishan Chunder, the manager, was the proper person to purchase the property for Lokhee Narain. Accordingly the evidence is that Ishan Chunder was called into the room, the state of the biddings was made known to him, and then he made upon the

(u) See also *Jan Mahammad v. Jhais Bakhsh*, I. L. R., 1 All, 290.

last bidding of Russool the small advance of Rs. 2. If the witnesses are believed, he took the bidding out of Russool's hands, who was professing to act for Lokhee Narain, saying at the time, or shortly after, that he purchased for Lokhee Narain. No doubt that depends upon the credit due to the witnesses, but there are circumstances in the case which corroborate them. There is the undoubted relation in which Ishan Chunder stood to the Zamindar ; the facts, also, that Russool bid no more, and the very small advance upon his previous bidding seem to shew that there was an understanding between the two agents, otherwise it is very unlikely that the very small advance should have stopped the biddings, and that the property should have been knocked down at that point.

" But not only do the circumstances attending the bidding at the sale give corroboration to the story, but the subsequent conduct of Ishan Chunder is inconsistent with his having purchased on his own account, and is entirely consistent with the view that he purchased on behalf of the Zamindar, for whom he was acting as manager. The possession is one of the real facts in the case about which there can be little dispute. It is not pretended that Ishan Chunder or his sons after his death obtained anything more than formal possession by the officer of the Court. They obtained that formal possession. How did they lose it ? They assert in their plaint, and for a purpose, that Lokhee Narain took forcible possession. There is not the slightest evidence of it, and it is conceded now that nothing like forcible possession was or could be taken. Lokhee Narain received the rents.....and therefore was in possession so far as possession can be obtained of property which is in the hands of ryots. He also paid the Government revenue. It is perfectly well-known to be a common practice in India where property is in the name of a man although not the true owner, that all the proceedings as far as the Government is concerned take place in his name. Their Lordships think that no very strong inference can be drawn against Lokhee Narain from the fact that in his petition to the Collector he states the title according to what it ostensibly was.

" Their Lordships, therefore, upon the whole matter, think that although Ishan Chunder may have had no previous instructions to purchase from Lokhee Narain, yet that, being his manager, and finding himself at this sale, he purchased for him, after having stopped Russool, who was there before him bidding for the Zamindar, in that operation. *It would be contrary to equity to allow a man who steps in and assumes the character of a principal agent, and deposes another who was really acting as agent, afterwards to turn round and say, I purchased the estate, not for the principal, but for myself, and to obtain a profit out of the estate he had so purchased.* Ishan Chunder himself does not appear to have intended to act in this manner because, as already observed, he gave possession of the estate to the Zamindar, by directing the tenants to pay their rents to him, and does not appear to have interfered in any manner inconsistent with the character he took upon himself at the sale—the character of a manager for the Zamindar." (v)

Section 260 of Act VIII of 1859 does not preclude the Courts from entertaining a suit brought by a decree-holder against the certified purchaser of property to bring the property to sale in execution of his decree as the property of his judgment-debtor, on the allegation that the certified purchaser had purchased the property *benâmi* for the judgment-debtor, who had remained in possession as owner from the date of purchase, and was in possession as such at the time of attachment. (w)

A Hindu widow, who resides with her husband and the members of his family in the family dwelling-house while he is alive, is entitled to reside therein after his death, and cannot be ousted by the auction-purchaser of the rights and interests in the house of her husband's nephew. (x)

A mere verbal error in the proceedings connected with the attachment and sale of property in execution of a decree, if it introduces no doubt as to what

(v) L. B. 2 I. A., at pp. 158—62.
 (w) *Sohun Lal v. Lala Gya Prasad*, 6 N. W. P. H. C. Rep., 265.
 (x) *Gouri v. Chandramani*, I. L. B., 1 All., 262. See also *Mungala Debî v. Dinonath Bose*, 4 B.L.R., O. J., 72; S.O. 12 W.R., O. J., 35; ante p. 105.

the Court intended to deal with, is not such a misdescription as will in any way defeat the auction-purchaser's rights.

Where a sale has been allowed to be completed by the Court without any opposition on the part of the judgment-debtor, who is cognizant of proceedings and accepts them so far as to petition for an extension of time, the sale ought not to be treated as a nullity. (y)

Under Act VIII of 1859, an equity of redemption can be sold in execution of a decree. (z)

A sale under a decree to a *bonâ fide* purchaser is valid notwithstanding the reversal of the decree upon appeal. (a) In *Suman v. Sarna* (b) the defendants purchased at a sale held in February 1888 in execution of a decree of Court making one Rampriya liable for a debt as *heiress* of her infant son Gourcenath. The plaintiffs as reversioners brought a suit in 1865 to set aside the sale on the ground that Rampriya, the mother of Gourcenath, fraudulently and collusively admitted a debt, which was a personal debt of her own. It was held (by Norman and Seton-Karr J.J.) that as no collusion was imputed to the purchasers, the plaintiffs were not entitled to recover. "It was not competent to the Court in this case," said Mr. Justice Seton-Karr, "to raise the question of fraud as against the defendants, purchasers, or to impugn the title which they derived from the sale and purchase effected in open Court and in pursuance of a decree. We might even go further and say that, had the decree been set aside on the ground of collusion between the decree-holder and Rampriya, the defendants, as *bonâ fide* purchasers, would still have been entitled to retain their purchase." Mr. Justice Norman added:—"It is important to observe that, if a sale takes place in execution of a decree in force and valid at the time of the sale, the property in the thing sold

(y) *Taranath Chuckerbutty v. Joy Soonduree Dabee*, 21 W. R., 93.

(z) *Srimati Suraswati Debi v. Nabadwip Ohandra Gosain*, 5 B. L. R., 380.

(a) *Behari Lal v. Rajaram*, 6 N. W. P. II. C. Rep., 291.

(b) 7 W. R., 312. See ante p. 202 (s).

passes to the purchaser ; and if the decree or judgment be afterwards reversed, the reversal does not affect the validity of the sale or the title of the purchaser."

The title of an auction-purchaser under a decree relates back to the date of sale although the sale may not have been confirmed until long afterwards. (c) In *Bhyrub Chauder Bundopadhyaya* (plaintiff) v. *Soudumini Dabee*, (d) the defend-

ant became a purchaser at an execution-sale of a share of certain property, of which the plaintiff held another share partly as Zamindar and partly as Patnidar : the sale took place in September 1872, but the defendant did not obtain possession until confirmation of the sale in May, 1873. Between the date of the sale and the confirmation, a considerable sum became due for Government revenue on the whole property and to prevent its being sold, the plaintiff paid the whole of the revenue due. In a suit to recover the proportion due in respect of the share purchased by the defendant, it was held by a Full Bench of the Calcutta High Court, that, on confirmation of the sale, the share purchased by the defendant must be considered to have vested in her from the date of the sale ; and, therefore, she was liable for the amount of Government revenue in respect of her share which became due between the date of the sale and its confirmation. "In our opinion," observed Sir Richard Garth, "the sale having been confirmed, and the purchaser having obtained a certificate, the interest of the judgment-debtor must be held, for the purposes of this suit, to have ceased from the date of the sale and to have thus become vested in the purchaser." (e) But the title of an auction-purchaser at a sale for arrears of Government revenue accrues not from the date of sale, but from the date on which the sale was confirmed, and certificate granted under the Revenue sale-law, inasmuch as such purchaser can exercise no rights

(c) *Kally Dass Neoghy v. Huronath Roy Chowdhry*, W. R., 1864, Cal. No., 279.

(d) I. L. R., 2 Cal., 141—46.

(e) I. L. R., 4 Cal., at p 145. See *ante*, p. 207 (c).

of ownership under his purchase, nor protect himself against alienation or waste till he receives the certificate. (f)

A sale of a share in a tenure, let out to a tenant in its entirety, does not of itself necessarily effect a severance of the tenure or an apportionment of the rent; but if a purchaser of the share desires to have such a severance, he is entitled to enforce it by taking proper steps for that purpose. If he takes no such steps, then the tenant is justified in paying the entire rent, as before, to all parties jointly entitled to it. But if the purchaser desires to effect a severance of the tenure and an apportionment of the rent, he must give the tenant due notice to that effect, and then, if an amicable apportionment cannot be made by arrangement between all the parties concerned, the purchaser may bring a suit against the tenant for the purpose of having the rent apportioned, making all the other co-sharers parties to the suit. It is impossible upon principle to distinguish cases where a tenure is sold privately from those where it is sold by public auction, or, on the other hand, to distinguish cases where a tenure is severed by different portions of its area being sold to different persons, from those where it is sold to different persons in undivided shares. In all such cases the entirety of the joint interest should be considered as severable at the option of the purchaser; and it would lead to the most inconvenient results, and to the depreciation of property thus sold in different lots, if the purchasers of such lots were compelled to collect their rents in one entire sum, conjointly with one another, or with the owners of unsold shares or portions. (g) Where seven mouzas had been let in patni to certain tenants by the Zamindar, and then, under a decree against the Zamindar, three of those mouzas were sold to A, and the other four to B. A then brought a suit against the patnidars to have his share of the patni-rent apportioned, making B;

Suit for apportionment of rent by purchaser of a share.

(f) *Babu Dheput Singh v. Mathuranath Jha*, W. B. 1884 Gap No. 278. See also secs. 27 and 28, Act XI of 1859; ante, p. 186 (u). [I. B.]

(g) *Iswar Chunder Dutt v. Ram Kissen Das*, I. L. R., 5 Cal. 902-6

purchaser of the other mouzas, a party to the suit : it was held that the suit was properly brought. (h)

The right or interest which the vendor of immovable property has in the purchase-money, where it has been agreed that the same shall be paid on the execution of the conveyance, is not, so long as the conveyance has not been executed, a debt, but a merely possible right or interest, and as such, under sec. 266, Act X of 1877, is not liable to attachment and sale in execution of a decree. The person who purchases such a right or interest at a sale in execution of a decree takes nothing by his purchase. (i)

The test to be applied in order to determine the exact interest which passes at a sale under the words "right, title and interest" of a Hindu widow in any properties, depends upon the question whether the suit in which the sale was directed was one brought against the widow upon a cause of action personal to herself, or one which affects the whole inheritance of the property in suit. (j) "This is the principle," observed Sir Richard Garth, "upon which the case of *Baijun Doubey v. Brijbhukan Lall Awusti* (k) was decided. The test applied in that case was, whether the decree for maintenance was a personal one against the widow, or whether it affected the estate of the reversioner; and as the Privy Council considered that the decree was a personal one against the widow, it was held, that, under the sale of her right, title and interest in the property sold, her own life-interest only passed to the purchaser." (l)

The immovable property of a Hindu widow was sold under a decree against her, and A was the purchaser at the sale. Afterwards during the life-time of the widow, the lands in question were sold for arrears of revenue due by A to Government in respect of other lands, and B was the purchaser at such

(h) *Sreenath Ohunder Ohuwadhry v. Mahes Ohunder Bondopadhyaya*, 1 Cal. L. R., 453.

(i) *Ahnad-ud-din Khan v. Majlis Rai*, 1 L. R., 3 All., 12.

(j) *Jotendro Mohun Tagore v. Jogul Kishore*, 1 L. R., 7 Cal., 357—67.

(k) L. R. 2 I. A., 275. S. C., 1 L. R., 1 Cal., 133 See ante p. 206.

(l) 1 L. R., 7 Cal. at p. 366.

revenue-sale C, the owner of the reversion, expectant on the life-interest of the widow had instituted a suit in her life-time to set aside the sale of the estate ; but this suit was dismissed under sec. 24, Act I of 1815, on the ground that more than a year had elapsed since the sale for the arrears due to Government. After the death of the widow, C, the reversioner sued B for recovery of possession of the lands. *Hill* (i) that the *life-estate* of the widow was alone acquired by the purchaser at the sale under the decree, and that life-estate alone was sold at the sale for arrears of Government revenue ; and that interest having expired, the reversioner was entitled to recover the possession of the lands : (ii) that the plaintiff was not barred by the dismissal of the suit instituted in the life-time of the widow, for the object of that suit was to set aside the assignments of the widow's interest, and not the assertion of the plaintiff's right to the reversion. (*m*)

A decree-holder fraudulently caused the sale in execution of his decree of certain immovable property belonging to a minor. The minor brought a suit for a declaration that such sale was invalid and obtained possession of the property from the auction-purchaser. The auction-purchaser sued the decree-holder to recover his purchase-money, and the costs incurred by him in defending the suit brought by the minor. It being found that the auction-purchaser was not a party to or cognizant of the fraud on the part of the decree-holder, the Allahabad High Court held (i) that neither the mere fact that the auction-purchaser knew that he was purchasing the property of a minor, nor the mere fact that he did not ascertain whether or not the sale was justified by the terms of the decree, disentitled him to recover the purchase-money from the decree-holder : (ii) that being innocent of fraud and having purchased in the *bonâ fide* belief that the property of the minor was saleable, the auction-purchaser was entitled to recover the purchase-money, but he could not recover the costs incurred by him in defending the suit brought by the minor, being a suit he ought not to have defended. Mr. Justice

(*m*) *Durga Churn v. Kassy Chunder Montree*, 1 Marsh., 539.

Pearson in delivering the judgment of the majority of the Full Bench in the case observed :—"To hold that the purchaser, if the sale of a minor's property is set aside, is not entitled to recover back the consideration from a third party who has brought about the sale and obtained the consideration, would very greatly depreciate the selling value of the property of minors. It is not apparent why in purchasing the property of minors the purchaser should be deprived of an equity which cannot injure the minor, and to which a purchaser would be entitled if the property purchased had belonged to a person of full age. If the doctrine of *caveat emptor* applies where the sale has been practically set aside, then it may be proper to hold that the omission to see that the order of sale was warranted by the decree amounted to such a want of reasonable care as to deprive the purchaser of his right to relief. But should not the question of what amounts to reasonable care be considered in reference to the circumstances of the place? In England purchases of real estates are rarely made without the intervention of a solicitor and a scrutiny of title. In these provinces such precautions are almost entirely unknown. However this may be, it would be going too far to hold that the mere omission to see that the order for sale was warranted by the decree ought to deprive the purchaser of relief under the circumstances at present known to the Court, if on other grounds he is entitled to it. Assuming then that the purchaser was innocent of fraud and purchased in the *bonâ fide* belief that the minor's property was properly saleable, there seems no reason why he should not recover back his purchase-money from the decree-holder through whose misfeasance the order for sale was obtained."

Sir Robert Stuart, C. J., however, held that the auction-purchaser was bound to ascertain the terms of the decree, that being guilty of fraud, he was not entitled to recover the purchase-money, and, assuming that he was innocent of fraud that having purchased with the knowledge that the property was the property of a minor and without ascertaining that the sale was justified by the terms of the decree, he could not re-

cover the purchase-money. With regard to the conduct of the auction-purchaser, an acute and cautious Mahajan of twenty-years experience, Sir Robert said :—"Under all the circumstances and having regards to his own evidence, the auction-purchaser must be taken to have had not only full notice of the minority of the person whose property he was seeking to purchase, but as having lent himself to a proceeding not only illegal and invalid in itself but grossly in fraud of the minor's rights. It was argued before us that the doctrine of *caveat emptor* does not apply to a public sale ; but for this opinion there does not appear to be any authority, although in a case like the present it is unnecessary to consider the question. Such a view of the law probably arises out of a misapprehension of the rules of the common law of England as to sales in market *overt*, but which can have no possible application to the sale in execution of a decree in India of the rights and interests of a minor. And in such a case as this where, under cover of a sale of such rights and interests, the minor's property was attached and taken, it would be subversive of all justice if an auction-purchaser was not made to feel the risk he ran and that, to say the least, he was fully, if not within the principle at least, liable to the penal consequences of the rule of law in question. The peril he undertook was in truth greater than that of a venturesome buyer shutting his eyes to his possible danger, for he clearly knew of Gungadin's minority and all the circumstances when he appeared at the sale, and he therefore not only acted in bad faith, but involved himself in a risk as purchaser which was different from that against, only because it was much greater than that against, which the doctrine of *caveat emptor* is directed. That doctrine relates to defects, latent defects, which the seller, at the inception of the contract, does not or is not bound to know or to inquire into, the purchaser taking the risk of the *status quo*. The doctrine, in truth, if it does not contemplate absolute good faith on both sides, at least puts the burden of inquiry and investigation on the buyer, but it has not the same application where there is any thing in the nature of bad faith or fraud. My belief is

that both parties, the decree-holder and the auction-purchaser, were in bad faith, and that in trying to overreach each other they have simply contributed to the well-known contention which results in honest men coming by their own. In short the sum and substance of the case is this : the decree-holder attempted to sell the property, and the auction purchaser took the risk on the chance of the sale *not* being successfully disputed by the minor, and lost his money on the venture." (n)

In a suit on a mortgage against a member of a joint Hindu family governed by the Mitāksharā law, the whole of the interest of the joint family in the estate was decreed to the mortgagees, who subsequently obtained possession of it. Afterwards a suit was brought by another member of the family, who had attained majority *prior* to the mortgage, to set it and the decree aside, so far as he was concerned, and to recover possession of his share of the joint family property. *Held* that the mere circumstance of an antecedent debt was not in itself sufficient to bind him, and that the alienation was not good against him, unless it could be shown that he had either expressly or impliedly given his consent to the mortgage. (o) "If he stood by," said Mr. Justice R. Mitter, "and thereby allowed the creditor with whom his father was dealing to believe that he was a consenting party, the transaction would be binding upon him."

Government revenue does not become due from day to day, but at certain specified times, according to the contract of the parties, or the custom of the district in which the lands liable to pay such revenue are situate. It is not, therefore, liable to apportionment ; and the person who is the owner of a revenue-paying estate at a time when the payment of the revenue falls due, is the only person liable for its payment. The purchaser of an estate which pays Government revenue takes it subject to all revenue and cesses, whether in arrear or accruing. *Held* therefore, in a suit by

Purchaser's liability to pay Government revenue.

(n) *Makundi Lal v. Kawnala*, I. L. R., 1 All., 573—74

(o) *Upooroop Tewary v. Lalla Bandhjee Suhay*, I. L. R., 6 Cal., 749.

a purchaser for a certain sum for Government revenue and cesses, which became due after the date of, though due for a period previous to his purchase, which sum he alleged he had been compelled to pay to save his interest in the subject of his purchase, that he was not entitled to recover. (p)

A purchaser at a sale in execution of a decree is liable for damages caused by a re-sale consequent on his not making the required deposit. (q)

In 1874, the plaintiff advanced money to F and Z on the security of a mortgage of certain properties. In 1875, the plaintiff took a conveyance of the properties mortgaged to him, setting off the money due to him under the mortgage against the consideration-money. At the time of this conveyance, the same property was under attachment under a decree obtained by another person, and the property was in execution of this decree, put up for sale, and purchased by one G. In a suit brought by the plaintiff on the mortgage-bond (to recover the money lent and asking that the properties might be liable to satisfy the debt) against F, Z, and G, it was *held* that the conveyance of 1875 being void as against G, the plaintiff was entitled to fall back upon the lien created by the mortgage-bond. (r)

A mortgagee who elects to take a money-decree, and becomes himself the purchaser of the property mortgaged at a sale in execution of that decree, may bring a suit to enforce his lien against a person who purchased the right, title and interest of the same debtor in the same property, at a prior sale in execution of a prior money-decree. (s)

Nothing passes to the auction-purchaser at a sale in execution of a money-decree but the right, title and interest of the judgment-debtor at the time of the sale. Where, therefore, a decree given under sec. 53, Act XX of 1866, declared the right

(p) *Ohatraput Singh v. Girindra Chunder Roy*, I. L. R., 6 Cal., 389.

(q) *Sreenarain Mitter v. Maharaja Mzhtap Ohand Bahadur*, 3 W. R., 3.

(r) *Gopal Sahoo v. Gunga Pershud Sahoo*, I. L. R., 8 Cal., 530.

(s) *Jummanjy Mullick v. Dossmoney Dosses*, I. L. R., 7 Cal. 714, (F.B.)

of the obligee of a simple mortgage-bond to bring to sale the hypothecated property, and such property was sold in execution of the decree, the auction-purchaser could not claim in virtue of the lien created by the bond to defeat a second mortgage. (t)

Where the holder of a simple mortgage-bond obtained only a money-decree on the bond, in execution of which the property hypothecated in the bond was brought to sale, and was purchased by him, he could not resist a claim to foreclose a second mortgage of the property created prior to its attachment and sale in execution of his decree. (u) The view of the Full Bench of the Calcutta High Court in *Montazooddeen Muhammed v. Rajcoomar Dass* (v) and the decision in *Ramu Naikan v. Subbaraya Mudali* (w) were dissented from by the Allahabad High Court. Mr. Justice Turner thus reviewed the authorities on the point:—"In *Ramu Naikan v. Subbaraya Mudali* (w) it was held that the purchaser under a money-decree could avail himself of the lien of the original encumbrancer as a shield and so defeat subsequent encumbrancers, and doubtless this ruling is supported by the dicta of the High Court of Calcutta, namely, that the collateral security passes to the auction-purchaser. In *Syed Nadir Hossein v. Pearoo Thavildarinee* (x) Mr. Justice Pontifex has ruled that a sale of the mortgaged property under a money-decree passes with it the lien; and in *Montazooddeen Mahomed v. Rajcoomar Dass* (v) the majority of the Court declared that, where a creditor under a bond by which property is mortgaged takes a money-decree and proceeds to attack and sell the mortgaged property he thereby transfers to the purchaser the benefit of his own lien and the right of redemption of his debtor and if there be no third party interested in the property, it becomes absolutely vested in the purchaser. The reasons on which these rulings proceed I understand to be the following—the mere taking of a money-decree does not destroy the lien and it continues an incident to the debt when it passes from a

(t) *Akheram v. Nundkishore*, I. L. R., 1 All., 236, (F. B.)

(u) *Khub Chand v. Kalian Das*, I. L. R., 1 All., 240, (F. B.)

(v) 14 B. L. R., 408. S. C., 23 W. R., 187.

(w) 7 Mad. H. C. R., 229. (x) 14 B. L. R., 425 nota. See *post* p. 235.

contract debt into a judgment-debt—as the creditor cannot sell the property and retain the lien, it must continue in existence so far as is necessary for the protection of the purchaser. It cannot be doubted that the mere taking of a money-decree does not destroy the lien, and that it continues a collateral security for the debt when it has merged in a judgment-debt, but I fail to see on what ground it can be held that the collateral security has passed by the sale or continues in existence to protect the purchaser. The mortgagee has not in the case supposed elected to avail himself of the collateral security. The lien subsists nevertheless until the debt is discharged, when the object for which it was created fails, and it ceases.

“The Calcutta High Court allowed that the fact that property is mortgaged to one is no bar to the mortgage or sale of the equity or right of redemption to another. Let it be assumed that the mortgagor sells his interest absolutely, then if the mortgagee sues on the personal undertaking only he must sue the original mortgagor, he cannot implead the purchaser, and if he obtains a decree he can enforce it only against the property of the mortgagor who *ex hypothesi* has no interest left in the mortgaged property, and if, instead of selling the mortgaged property he sells the property of the mortgagor, no interest in collateral security can pass by such a sale to the purchaser.” (y)

When a person to whom property is pledged for a debt, obtains a simple money-decree against his debtor, he cannot execute that decree against the property pledged to the prejudice of a subsequent *bonâ fide* purchaser. He may enforce his lien by separate action against the party in possession of the property pledged to him, but he cannot execute the money-decree against the property in the hands of the subsequent purchaser. (z)

A purchaser of a putni sold in execution, buys it with all its liabilities, including instalments due to the Zamindar. (a)

(y) See the observations of GARTH, C. J., in *Doss v. Phookun*, I. L. R., 7 Cal., 680-82. See *post* p. 238.

(z) *Gopseerath Sing v. Sheo Sahay Sing*, 1 W. R., 315; B. L. R., Sup. Vol., 72. See also *Brindabun Ohunder Shaha v. Jance Bibes*, 6 W. R., 312.

(a) *Sheikh Khoda Bulsh v. Degumburee Dassas*, W. R., 1864, 207.

Plaintiff purchased *two-thirds*, and defendant *one-third*, of the rights and interests of certain judgment-debtors sold in execution of a decree. Plaintiff paid his own and defendant's quota of the purchase-money, and on defendant's failure to re-imburse him, sued for possession of the whole property, on the ground that he should be considered the sole purchaser. The Lower Court directed the defendant to pay his share of the purchase-money to the plaintiff with interest, which was accordingly done. Though the relief granted by the Lower Court was different from that prayed for in the plaint, the order was not disturbed in appeal, as it did substantial justice. (b)

The purchaser at a sale in execution of a decree founded upon a bond which mortgaged the property, was held not to have a preferential title over a prior purchaser, because the liability of the property under the mortgage was not declared in the decree, which was only a money-decree. (c)

Where a purchaser at a sale in execution was named in the sale-certificate as "mother and guardian of her infant son," the title to the property was held to be vested by the certificate in the minor absolutely. (d)

The holder of decree, in execution of which property is sold, is absolutely bound under sec. 294 of Act of 1877 to have express permission from the Court before he can purchase the property; and whether this objection is taken and pressed or otherwise, a sale to him is invalid, unless he has got explicit permission. The use, at a sale, of language by an intending bidder in disparagement of the property for the purpose of influencing or calculated to influence bystanders, and deterring them from bidding a fair price for the property, is a "material irregularity," sufficient to render the sale invalid under sec. 311 of the same Act. (e)

(b) *Brijoo Ram Misser v. Bhagwan Dass*, 7 W. R., 180.

(c) *Bromo Gopal Adhikari v. Bholanath Poddar*, 10 W. R., 309.

(d) *Hemanginee Dassee v. Jogendra Narain Roy*, 12 W. R., 236.

(e) *Rukhinee Bullubh v. Brajonath Sirkar*, L. L. R., 5 Cal., 308—9.

See ante—Slander of Title—pp. 139—40.

A sale in execution of a decree is not invalidated by the fact that the balance really due is over-stated, there being no other irregularity in the publication and conduct of the sale. (f)

If when a judgment-debtor's rights and interests in property are sold, the property is lawfully in the possession of tenants, the proper course is not to dispute their lawful possession and occupation, but to place the purchaser in a condition to receive from them the rents in the place of the judgment-debtor. (g)

Although it is the general rule in the North-western Provinces that a tenant's holding is not transferable without the Zamindar's consent, yet the exceptions to this rule are so far from being rare that it is necessary in each case to come to a distinct finding as to whether or not, by custom, tenants with a right of occupancy in the estate in which the holding in suit is situate, are competent to transfer their holdings without the Zamindar's consent. (h) Where such holdings are transferable, the tenants' right, title and interest therein may be sold in execution.

A mortgagee of two separate properties became by purchase the owner of the equity of redemption of one of them, and of this property the value was so proportioned to his payments that the mortgage-debt was in effect satisfied. This mortgagee, however, obtained a decree and order in execution for the sale of the other property, on which his mortgage was the second. Of the latter property, the plaintiffs, who also represented the first mortgagee, had become purchasers, and they filed objections to the sale. These were disallowed, and they thereupon paid into Court money sufficient to satisfy the decree in order to prevent the sale. *Held*, that this was not a voluntary payment, nor a payment of money equitably due; but one made under compulsion of law, *i. e.*, under pressure of the execution-proceedings. And *held*, that this might be recovered in a suit for a money decree, the remedy not being confined to the execution proceedings. (i)

- (f) *Chatter Sang v. Mt. Dhurum Koonwar*, 1 N. W. P. H. C. Rep. 61.
 (g) *Debenanted Service Bank v. Palmer*, 2 N. W. P. H. C. Rep. 456.
 (h) *Muz. Hidayat Ali v. Babro Lal Sang*, 1 N. W. P. H. C. Rep. 86.
 (i) *Dulchand v. Ramkishan Singh*, 1 L. R., 7 Cal., 648-49. (P. C.)

Auction-purchasers with notice of a mortgagee's lien are liable to pay off the mortgage and to satisfy any decree which the mortgagee may obtain in regard to the property in a suit pending at the time of the purchase. Such decree cannot be satisfied by payment into Court unless the mortgagee has the means of immediately taking the money out of Court, or acquiesces in such payment as payment to himself. (j)

Smallness of price is not a sufficient ground for setting aside a sale, unless it be the effect of an irregularity in the sale proceedings. (k) Mere inadequacy of price is not conclusive proof of *mala fides*, (l) nor a sufficient ground for setting aside a sale in execution, if no substantial injury has been caused to the judgment-debtor by any material irregularity in publishing and conducting the sale : and the mention of the name of a wrong parganah in the notice of sale is not such an irregularity, when the notice has been served in the right mouzah and the estate has been identified. (m)

Fraud renders every transaction voidable against a party to the fraud at the election of the party defrauded. Where therefore a bidder at a sale by public auction succeeded by the exercise of fraud and collusion with the agent of the execution-creditor (though without the creditor's personal knowledge) in becoming the purchaser of the right, title and interest of the judgment-debtor in three villages at a gross undervalue, and there was no material irregularity in publishing or conducting the sale, it was held by the Madras High Court (i) that the (Munsif's) Court, which ordered the sale, had jurisdiction to refuse to confirm the sale on the ground of the fraud practised by the agent of the execution-creditor and the purchaser ; and (ii) that the High Court had power under the Act and Charter or under sec. 622 of Act X of 1877 to rescind the order made by the Munsif confirming the sale, to set aside the sale itself, and to direct a resale. Mr Justice

(j) *The Land Mortgage Bank v. Ram Ruttan Neegy*, 21 W. R., 270.

(k) *Reet Bhunjun Singh v. Mitterjeei Singh*, 6 W. R., Mis., 31.

(l) *Kumola P. Naram Singh v. Nokh Lal Sahoo*, 6 W. R., 30.

(m) *Neeral Hossein v. Ramkumar Sahas*, 25 W. R., 326.

Kernan further held that the party defrauded ought not to be referred to bring a regular suit, and the question ought to be decided at once on motion in the original cause. Mr. Justice Muttusami Ayyar in concurring with his eminent colleague observed: "Upon the facts found it is clear that the agent of the execution-creditor prevented one Chetti, in concert with the purchaser and with a view to favour him, from either bidding at the Court-sale or lending money to the judgment-debtor to pay off the judgment-debt and thereby obviating the necessity for the sale. It appears that the property placed under attachment was in consequence sold for a price less than what it might have otherwise fetched. Thus there was fraud upon the policy of the law as to sales by public auction, (n) and there was also substantial injury sustained, from such fraud; and the question for decision is whether the sale may be set aside on the ground of the fraud, upon petition and otherwise than in a regular suit. It is directed by sec. 286, Act X of 1877, that sales shall be made by public auction, which is in law a mode of sale to the highest bidder, neither puffers being employed where it is a sale without reserve nor persons willing to bid being prevented from bidding. If 'material irregularity' is a ground for annulling a sale, I do not clearly see why fraud which shows that the sale was not a *bonâ fide* transaction, but a mere sham, is no ground for annulling it. Whatever doubt there may be as to fraud being a ground of relief on petition when it is a remote cause of the sale, or when the purchaser is no party to it, I think it is a valid ground of relief where it relates to the *mode* in which the auction is held and negatives one of the pre-requisites of a *bonâ fide* sale by public auction authorized by sec. 286, and the purchaser is a party to it." (o)

A party who bids for an estate at a sale in execution, knowing that he is not able to deposit the earnest-money, obstructs the business of the Court, and is guilty of contempt of Court, punishable under sec. 228 of the Penal Code. (p)

(n) See ante p. 141.

(o) *Subbaji Rau v. Srinivâsa Rau and Pulliah*, I.L.R., 2 Mad., 264-70.

(p) *In re Mohesh Chunder Mookerjee*, W. R., 1884, Mis., 3.

Before a purchaser at a sale in execution of a share of a specific mehal in an estate is entitled to possession and to a butwarra of his purchase, its nature and extent must be clearly determined and defined in the Civil Courts. (q)

A sale to a *bonâ fide* purchaser for valuable consideration in execution of a decree outstanding and in force at the time, is a good and valid sale. (r)

In execution of a decree, the judgment-debtor's right, title and interest in a certain property were attached. The plaintiff thereupon preferred a claim under conveyances from the judgment-debtor, but it was rejected, and the property was sold. The judgment-creditor purchased the same at the auction, and sold it to the defendant, who ousted the plaintiff, who thereupon sued to recover possession under his conveyances : *Held* that the *onus* was not entirely upon the plaintiff to prove *bona fides* of the sale, but that the evidence adduced by the defendant should be examined also. (s)

A, a Hindu, was possessed of an undivided moiety in certain property, and was also entitled to a reversionary interest in the other undivided moiety contingent on his surviving his mother. In a suit against A, the Sheriff, under a writ of *fi-fa*., seized and sold to B the right, title and interest of A in the premises. In an *ex-parte* suit by B, asking for a declaration that he was entitled to the contingent reversionary interest of A, as well as to his present possessory right, Macpherson, J., gave a decree for the present possessory right, but refused to make any decree as to the contingent reversionary interest of A. (t)

A purchaser at an execution-sale takes subject to all the equities affecting the judgment-debtor, and will be bound by constructive notice in the same way as an ordinary purchaser. (u)

(q) *Nilmonce Doss Ohund v. Sreekant Doss Ohund*, 5 W. R., 49.

(r) *Fyazoorideen Bhooya v. Sumsoonnissa Bibes*, 12 W. R., 508.

(s) *Srimati Debi v. Mudun Mohun Singh*, 2 B. L. R., A. C., 326.

(t) *Kisto Dhon Gangooly v. Rabutty Dassees and others*, 1 Ind Jur., N. S., 324. See as to what can be sold in execution, *ante*, p 194, (x). [188.

(u) *Ram Lockun Sirkar v. Ramnarain*, 1 Calc. L. R., 296 See *ante* p.

The purchaser of zamindari sold in execution of a decree is entitled to all the rents accrued due from the zamindari. date of his purchase; and if the tenants or ryots, after having notice of his title, choose to continue to pay their rents to, or for the use of, the former proprietor, they do so at their peril, and cannot plead such payments in answer to a suit for rent by the new owner. (v) The purchaser of a Zamindari, with notice of an alleged mokurrari tenure, is entitled to enquire into the validity of such mokurrari, and to enhance the rents if the mokurrari is found really not to exist. (w)

A purchaser at an execution-sale should never omit to obtain a certificate of sale and register it, before he sues for the property purchased at such sale. Otherwise his suit is liable to be dismissed for want of a right of action. (x)

Auction-purchasers at a sale in execution of a decree are not estopped from asserting, as against a person claiming to be a mortgagee prior to the sale of the property purchased, that in fact the property was their own, independently of the auction-sale. At the most their conduct in making the purchase could only be regarded as some evidence of an admission of title in the judgment-debtor, which they could explain or rebut. (y)

A person who purchases immovable property at an execution-sale, knowing that the judgment-debtor has no saleable interest therein, is not entitled to the benefit of the provisions of 313 of Act X of 1877, which were designed for the protection of persons who innocently and ignorantly purchase valueless property. (z)

(v) *The Collector of Rajshahye v. Hursoodary Debta*, W. R., 1864, Act X. B., 6.

(w) *Modhoosudun Sircar v. Umurnath Ghose*, 5 W. R., Act X R., 58.

(x) *Harkisandas Narandus v. Bar Ichha*, I. L. R., 4 Bom., 155. See however *Doorga Nurain Sen v. Beney Madhub Mozoomdar*, I. L. R., 7 Cal., 199. In this case the Calcutta High Court was of opinion that the order affirming the sale would be sufficient to pass a title to the purchaser, and the certificate which might afterwards be obtained by him, would be merely evidence that the property so passed, [145.]

(y) *Pandit Hanuman Dat v. Mufti Assad-Ullah*, 7 N. W.P.H.C. Rep.

(z) *Mahabir Passad v. Dhuman Das*, I. L. R., 3 All., 527.

Section 3—(C) Sales in execution of mortgaged property.

No Court of Equity ought to direct hypothecated property to be sold, and its proceeds applied to the satisfaction of the debt for which it is security, without first taking care to ascertain that the debt stated to be due in the security bond is really due. (a)

A suit for the sale of mortgaged property in satisfaction of the mortgaged debt is, 'a suit for land' within the meaning of the Civil Procedure Code. A decree in a suit in the Mofussil for the recovery of a mortgaged-debt with interest, and in default for sale of the mortgaged property, enables the plaintiff to sell the mortgaged property as it stood at the time of the mortgage and clear of all subsequent encumbrances. Such a sale completely bars redemption. (b)

In *Syud Nadir Hossein v. Pearoo Thavildarinee* (c) it was held that an attachment under a money-decree on a mortgage-bond and a mortgage-lien cannot co-exist separately in the property hypothecated, and such an attachment must be treated when existing as an attachment for enforcing the lien; and that if property subject to such lien is sold in execution of a decree while it is under attachment under the decree upon the mortgage-bond, the lien existing upon the property is transferred from the property to the purchase-moneys, and thereupon the property becomes thenceforth discharged from the lien. Sir Richard Couch in delivering the judgment of the Full Bench in *Syud Emam Momtazooddeen Mahomed v. Rajcoomar Dass* observed:—The object of a sale of mortgaged property in execution of a decree is not to transfer the debt from the debtor

(a) *Amritnath Jha v. Dhunput Sing Bahadoor*, 20 W. R., 253. [269.

(b) *S. J. Leslie v. The Land Mortgage Bank of India, Ltd.*, 18 W. R.,

(c) 14 B. L. R., 426 (foot note). See also *ante* p. 229.

to the purchaser of the mortgaged property, but to obtain satisfaction out of the security. Thus, whether the decree do or do not direct the sale of the mortgaged property, the mortgagee, when he puts that property up for sale, sells the *entire* interest that he and the mortgagor could jointly sell. It cannot be rightly contended that the mere taking of a money-decree extinguishes the creditor's lien. If then the lien be not extinguished by taking a money-decree, and if it continue an incident of the debt when it passes from a contract-debt into a judgment-debt, it must continue in existence so far as may be necessary for the protection of the purchaser, as the creditor cannot sell the property and retain the lien. An order for sale cannot conclude persons not parties to the suit, and without such order, in the absence of any third party interested in the property, a complete title passes by the sale in execution of the money-decree. If there be persons not parties to the suit claiming an interest in the property, no form of dealing with the property in their absence can prejudice their rights. The decision of the Full Bench in *Gupinath Sing v. Sheo Sahay Sing* (d) is clear on this point. It seems to us that that decision does no more than declare this as a fundamental rule. A subsequent incumbrancer cannot be concluded by any order otherwise than in a suit to which he is a party. The fact that property is mortgaged to one is no bar to a mortgage or sale of the equity, or right of redemption to another. The remedy of the mortgagee under a mere money-decree and under a decree for sale being identical so far as the parties to the suit are concerned, he cannot have a right to a second suit against the same parties to enforce what he has already obtained. Of course there may be a right of suit remaining against third persons not parties to the first proceeding." (e) Mr. Justice Markby thus qualified his concurrence with the Full Bench ruling in the case: "Whether the rights of third parties are in any way affected by the sale or not, is not a

(d) B. L. R., Sup. Vol., 72. See *ante* p. 230, (a).

(e) 14 B. L. R., 421—37. See *ante* pp. 229—30.

matter, which as it appears to me, we are called upon to decide in the present case. There are decisions upon this point, (f) and I should desire further consideration before holding that in no case the rights of third persons, created subsequent to the security, are in any way affected by a sale under the security bond, that is to say, so far as it can be said to affect their rights that the whole property pledged should be turned into money at the instance of the first pledge. As a general principle of law I should be inclined to say that the right to sell the very thing pledged is inherent to the pledgee, and as a general rule I should also say that no claimants upon the property posterior to the first pledge can interfere with this right, though, of course, they may have a right to redeem before sale; and they may have a very effectual claim on the surplus-proceeds, if there are any left after satisfying the first pledgee. In England the law has been somewhat slower than elsewhere in giving to the pledgee a right of sale, but neither in the English law nor in any other law, as far as I am aware, has there been any doubt that, if the pledgee can sell at all, what he sells is the property pledged: and it appears to me to be very doubtful whether it would not be undesirable both for pledgor and pledgee that there should be a sale of anything else, because such a sale might lead to the property being sold at a very inadequate price, as it will be uncertain whether the purchaser is buying the property itself, or a mere right to hold it subject to some claim of third parties." (g)

Where a mortgagee obtains a decree against his mortgagor for sale of the mortgaged property to satisfy his debt, he cannot sell that property reserving his own rights over it, because it is for the very purpose of satisfying those rights that the sale is made: And if, instead of obtaining a decree for the sale of the mortgaged property, the mortgagee obtains only a simple money-decree and sells the mortgaged property under

Mortgagor and
mortgagee.
Mortgage bond.
Mortgage-decree
or money-decree
Lien.

(f) *Sheo Prosun Singh v. Brojoo Sahoo*, 7 W. R., 232; *Braja Eaj-kishore Dasi v. Mahamed Salem*, 1 B. L. R., A. C., 152,
(g) 14 B. L. R. at p. 441. See *post* p. 239.

it, he is precisely in the same position as far as his own interest is concerned. In either case, the purchaser at the execution-sale takes the property sold freed from the mortgagee's lien. But where the mortgagee puts up the mortgaged property for sale at a time when the mortgagor has no longer any interest in the property, then nothing passes by the sale, and the execution-purchaser does not get any benefit from the fact that, previously to the sale, the mortgagee had a lien on the property. (h) The object of the Full Bench Ruling in *Syud Emam Momtazodeen Mahommed v. Rajcoomar Dass* was to prevent the mortgagee from selling the mortgaged property reserving to himself his own lien, inasmuch as it would be contrary to justice to enable the mortgagee to sell the mortgagor's interest for the payment of his mortgage debt without giving the purchaser the benefit of his own lien. "When the mortgagee," said Sir Richard Garth, "puts up for sale the mortgagor's property, and sells it, his lien passes with the property, because having regard to the nature and object of the sale, the lien is inseparable from the property. It would be contrary to all justice, and to the avowed object of the sale, to allow the mortgagee to sell the property for the purpose of satisfying his debt, and yet to reserve his mortgage rights as against the purchaser. But, when the mortgagee professedly puts up the mortgagor's property for sale, but in fact sells nothing, because the mortgagee has no property to sell, why should the mortgagee's lien pass to the purchaser? The reason why it passes in the other case is entirely absent in this; and I know of no provision of the law which enables a judgment-creditor, under the colour of selling his judgment-debtor's property, to sell his own."

In the case of *Muthura Nath Pal v. Chundermoney Debia* (i) in which the question in issue was whether the plaintiff's purchase at the execution-sale (upon a money-decree obtained by the mortgagee against the mortgagor) was to be preferred to

(h) *Ramanath Dass v. Bolaram Phookan*, I. L. R., 7 Cal., 677-78.
 (i) I. L. R., 4 Cal., 817.

that of the defendant who purchased from a donee under a deed of gift from the mortgagor, and which last purchase was prior in point of time, but long subsequent to the date of the mortgage in execution of decree under which the execution-sale took place. It was held that the execution-purchaser bought the entire interest which the mortgagor and the mortgagee could jointly sell and not merely the right, title and interest of the mortgagor as they stood at the time of the execution-sale, and that, therefore, the execution-purchaser was entitled to a decree declaring that he was no longer liable to pay rent to the purchaser from the donee of the mortgagor. Mr. Justice Markby in his learned judgment on the case remarked :—
 “The important question is, what is the effect of such a sale upon the rights of Chundermoney, who derives his title from a grant by the mortgagor posterior to the mortgage-bond. It is I think clear law, that the mortgagor cannot, by a subsequent grant, derogate from the rights of his mortgagee to be paid his principal, interest and costs out of the property pledged; and that the proper, and indeed the only, mode for the mortgagee to realize his money under a mortgage of this kind (*i. e.*, an ordinary Bengali bond pledging the land) is to get a decree for it and to bring the mortgaged property to sale by process of execution.” (*j*)

A suit was instituted on a mortgage of a single revenue-paying estate in the Court of the Subordinate Judge of the district of Backergunge, under the provisions of sec. 19, Act X of 1877, and a decree was obtained for the sale of the mortgaged property. On an application for execution of the decree to the Court which passed it, it was held that the Court was competent to order a sale of the whole of the mortgaged property, though only a portion of it was situated in the district of Backergunge. (*k*)

(*j*) I. L. R., 4 Cal., at p. 820. See also *Nasidas Jitram v. G. Joglekar*, I. L. R., 4 Bom. 57; *Kheoraj Jusrup v. Lingaya*, I. L. R., 5 Bom. 3.

(*k*) *Shuroop Chunder Goohe v. Ameeroonnissa Khatoon*, I. L. R., 8 Cal., 703—4. See also *Kally Prosonno Bose v. Dinonath Mullick*, 11 B. L. R., 56; S. C. 19 W. R., 431.

On the 15th July 1864 two undivided brothers executed a mortgage of their joint property to the plaintiff for Rs. 500, and on the 8th January 1868 they executed another mortgage of the same property for Rs. 1,000 to the defendant, who registered it under Act XX of 1866. In August 1871 a suit was brought against the brothers by the plaintiff on the mortgage of 1864, and a decree for the sum due was made in October 1871, directing that if the sum due was not paid within two months the mortgaged property should be sold. In March 1872 the property was sold in execution of the above mentioned decree and bought by the plaintiff, who was duly put into possession. In 1871 a suit was brought against the brothers on the mortgage of 1868 by the defendant, a decree was made similar to that in the above mentioned suit, a sale of the property was had, and it was bought by the defendant. The plaintiff was thereupon dispossessed and referred to a regular suit, and the defendant was put into possession. This suit was then brought by the plaintiff, the first mortgagee and purchaser, to eject the defendant, the second mortgagee and purchaser, and the Lower Appellate Court making a decree in favour of the plaintiff, the defendant filed this second appeal. *Held* that the mortgage of 1864 did not require to be registered in order to maintain its priority over the mortgage of 1868. *Held also* that the plaintiff having bought the rights and interests of the mortgagors under a sale held prior to the sale to the defendant, the mortgagors had no right or interest to sell to defendant; but that as the purchase by plaintiff was subject to the mortgage to the defendant, and as defendant was not a party to plaintiff's mortgage suit, defendant's right as mortgagee was not affected by the sale to the plaintiff, though effect could not be given to that right in the present suit. (1)

Immovable property was sold on the same day in execution of two decrees, one of which enforced a charge created in 1864 and the other a charge created in 1867: *Held* that the purchaser at the sale in execu-

(1) *Venkataraman v. Ramiah*, I. L. R., 2 Mad., 106.

tion of the decree enforcing the earlier charge, was entitled to possession in preference to the purchaser under the decree enforcing the latter charge, notwithstanding that the latter had obtained possession in virtue of his purchase. (m)

A mortgagee purchasing his own security at an execution-sale on a money-decree can still be redeemed by subsequent purchasers or incumbrancers from the mortgagor on payment of principal, interest and costs : (n) for a mortgagee purchasing the mortgagor's equity of redemption becomes a trustee for the mortgagor against whom he cannot acquire an irredeemable title. (o)

A gave a mortgage to B of certain property as a security for money lent and covenanted not to alienate the property by gift, izara, patni, or otherwise by which loss might be caused to the existing assets of the property. A subsequently granted a patni to C. B obtained a decree against A for the amount of the loan, and the property was sold in default of payment. D was the purchaser at the auction-sale. *Held* that D could maintain his suit against C to set aside the patni and for possession (p)

The purchaser of property sold under a decree in favour of a mortgagee cannot claim to set aside, as prejudicial to his rights, a ticca patlah granted by the mortgagor, when those rights were not in existence. (q) But such purchaser is not bound by leases made by the mortgagor after the date of the decree, unless he has recognized the lessees as his tenants,—as, for instance, by receiving rent. (r)

The mortgagee who puts the Court in motion to sell, is held to be estopped from denying that his interest as mortgagee has passed under the sale of the right, title and interest of the mortgagor or his heirs to the purchaser, although the mort-

(m) *Janki Das v. Badri Nath*, 1 L. R., 2 All., 694. See however *Dirgopal Lal v. Bolakee*, 1 L. R., 5 Cal., 269.

(n) *Gopee Bundho Santra Mahapatrur v. Kallypodo Banerjee*, 23 W. R., 338. See ante p. 242. (l)

(o) *Srimati Kamini Debi v. Ramlochan Sirkar*, 5 B. L. R., 450.

(p) *Brajaraj Kishori Dasi v. Mahammed Salim*, 1 B. L. R., A. C., 152. See also *Rajnarayan Singh v. Shera Meah*, 7 W. R., 67.

(q) *Benec Pershaud v. Reet Bhunjun Singh*, 10 W. R., 325.

(r) *Mt. Koomeroomissa Begum v. Hanuman Doss*, Marsh 122.

gagee has not executed a conveyance to the purchaser. (s) It is not the practice in the Mofussil to require the mortgagee to convey to the purchaser. The transfer takes place by way of estoppel. A, mortgaged his land to B in 1861, which mortgage was then registered, but the mortgagee did not enter into possession. Subsequently, in 1866 A leased the same land to C. That lease was registered and C entered into possession. In 1867 B obtained a decree upon his mortgage, and in execution attached and sold the mortgaged property. C, who had applied to have this attachment removed and failed in his application, sued to establish his right under the lease and recover possession. *Held* that, under the lease of 1866, C took what the mortgagor had to give him, viz., a lease subject to the registered mortgage, and that he could not resist a claim to possession by the purchaser at the sale in execution. (t)

In a suit for possession between two purchasers, who had bought the same property at two several auction-sales under decrees obtained on two several mortgage-bonds,—*held*, that no question could arise as to which mortgage was prior in point of time, but that the real question to be decided was, which of the parties could prove a prior title to possession. (u) A, on the 11th March 1868, took a mortgage-bond of certain property, and obtained a money-decree on the bond on the 23rd January 1869. Under this decree the mortgagor's interest was put up for sale and purchased by A on the 29th April 1870. B, on the 3rd November 1868, took a mortgage-bond on the same property, and obtained a decree thereon on the 31st May 1869. Under this decree the mortgagor's interest was sold, and purchased by B on the 22nd April 1870. B took possession of the property on the 18th May 1872. In a suit by A for recovery of possession : *Held*, that B was entitled to retain possession as against A, although his own interest might be merely that of a trustee for the mortgagor, and might be subject to A's mortgage lien, if he took proper proceedings to enforce it. (v)

(s) *Shahid Abdulla Sarba v Haji Abdulla*, I. L. R., 5 Bom., 8—13.

(t) *Sheshgiri Sheshbhoy v. Salvador Vas*, I. L. R., 5 Bom., 5—7.

(u) *Nannaji Chand v. Teluchdaya Koer*, I. L. R., 5 Cal., 265.

(v) *Durgamat Lal v. Bolakes*, I. L. R., 5 Cal., 269.

Section 4.—Of High Court Sales other than sales in execution.

Sales by the Registrar of a High Court in the exercise of its Ordinary Original Civil Jurisdiction are governed by rules and principles as to sales by the Court of Chancery in England. If the purchaser at such a sale refuses to complete or takes no steps to do so and is thought to be poor of means, the vendors may apply upon notice to such defaulting purchaser for an order that the property be re-sold and that "he may pay the expenses arising from his default, the costs of such application and of the re-sale and the deficiency, if any, in price upon such re-sale." (*w*) Under such an order, the prime purchaser has still a *locus penitentie*; so that if the property being a reversion, fall into possession before a re-sale, he may claim it on paying his purchase-money with costs. (*x*)

Where there is great hardship and the contract is inequitable, the purchaser will under extraordinary circumstances of surprise, mistake or inadvertence and in very exceptional cases, be allowed to forfeit his deposit and abandon the contract, if he comes to Court for relief speedily and without any delay. (*y*)

When the sale is by the Court, the ordinary decree is simply that the property be sold by the Registrar with the approbation of the Court. The Registrar, following the practice of the Master of the Rolls of the old Supreme Court, inquires into the title with a view to preparing the conditions of sale, which are drawn up by the attorney of the party having the conduct of the sale and then settled by the Registrar in the presence of the parties to suit. And after the sale, a purchaser, who is not satisfied with the title to the property sold, is entitled to have an inquiry as to the title, and the Court will not knowingly pass off an absolutely bad title by means of

(*w*) Dart on V. and P., 5th Ed., p. 1226.

(*x*) *Robertson v Skelton*, 13 Beav., 91.

(*y*) Dart on V. and P., 5th Ed., p. 1227.

special conditions. In sales by the Court, the parties alone convey, and the officer of the Court does *not* join. If the purchaser fails to complete, and the interference of the Court becomes necessary, one of the parties to the suit is the proper person (and is the person who in practice does always apply) to the Court and put the Court in motion. The Registrar or officer conducting the sale on behalf of the Court never applies.

The purchaser at a Court sale by the Registrar generally, if he is so willing, applies to have the sale confirmed.

The Court cannot act against a person who is not a party on the record, unless he has come in and done some act which subjects him to the jurisdiction of the Court in the suit. The purchaser bidding at a sale by the Court subjects him to the jurisdiction of the Court, for "the contract is entered into in the course of the sale by the Court." (z)

In the Presidency-towns the purchaser under a decree for sale in a mortgage-suit is entitled to a conveyance duly executed by the mortgagor and the mortgagee or their representatives in interest. But where a mortgagee becomes the purchaser of

Mortgagor need not convey upon a sale of mortgaged property in execution of a decree for sale.

property sold under a decree for sale obtained by him on his mortgage, it is not necessary that the mortgagor should join in the conveyance of the property to the mortgagee, as it is causing additional trouble and expense, without being of any real benefit; for the title of the purchaser is complete without the mortgagor joining in the conveyance. The equitable estate which was in the mortgagor vests in the mortgagee as a purchaser under a decree of the Court, in addition to the legal estate which was already in him. This completes his title, and, therefore, nothing further is required. (a) A mere certificate of sale* by the Court is sufficient to complete the title of the purchaser who buys under a decree upon his own mortgage.

(z) *Per* MACPHERSON J., *Ohandra Nath Biswas v. Biswa Nath Biswas*, 6 B. L. R., pp. 492—93 (footnote.)

(a) *Per* MACPHERSON J., *Jaleeram v. Chunder Coomaree Dasse*, 12 B. L. R., App. 7.

* In the Original Side of the Calcutta High Court, all sale-certificates are signed by the Registrar thereof, and not by a Judge as in the Mofussil.

The Court never orders an adult party to the suit to sell his own property to pay his own costs ; and in most partition suits, no costs are made to fall upon the parties other than the parties' own costs respectively ; and so it happens in partition suits commonly that, although the Court has the property before it and within its reach, it does not order any portion of the property to be sold for the payment of costs. It is only when some of the parties are under disqualification, such as infants, lunatic, married women, and so on, and some other person is therefore liable in the first instance for the costs of suit incurred on their behalf, that the Court orders these costs, for the benefit of those third persons to be raised by sale of the share of the infant, lunatic, and so on. Similarly, in administration suits where third persons, such as creditors, trustees, are concerned the person administering the property himself, is entitled to be paid his costs by the persons to whom the property belongs, the Court orders that property to be sold for the purpose, and in this way, so to speak, executes its own orders. (b)

The Court cannot sell as the property of a litigant party, that which, at the time of the sale does not belong to him, and it cannot sell the property of a person who is not a party to the suit in which the order is made. The Act of the Court transferring the property is but the act of the party himself put beyond the reach of all question by reason of being done under the sanction and compulsion of the Court. (c)

The following are some of the rules as to *Reisgtrar's Sale* in the Calcutta High Court :—(d)

If the abstract of title be not delivered within the time specified in the conditions of sale, a summons
Application to compel delivery of abstract. may be taken out by the purchaser and served on the party conducting the proceedings, requiring him to deliver the abstract within a limited time. Such order shall be made thereon, and as to the costs of the application, as to the Judge shall seem fit.

(b) *Per PHEAR J.*, in *Kailash Chunder Ghose v. Fulchand Johari*, 8 B. L. R., 479—80.

(c) *Ibid.*, 8 B. L. R., at p. 477

(d) See Belchamber's Rules and Orders, pp 189—205.

Any disputed question arising out of objections or requisitions by a purchaser may be brought by either party before the Registrar, who shall certify his opinion, and shall also certify by whom the costs ought to be paid.

When important questions of title are in dispute, either party may apply, on summons, for an order that it may be referred to the Registrar to inquire whether a good title can be made.

If the title be found to be good on grounds not appearing on the abstract, the purchaser, unless otherwise ordered, shall be entitled to the costs of the enquiry. If the title be found to be good on grounds appearing on the abstract, the purchaser, unless his objections have been frivolous and vexatious, or unless otherwise ordered, shall not be liable to pay more than his own costs of the enquiry.

When a sale of immovable property is set aside, the purchaser unless precluded by the conditions of sale, or unless otherwise ordered, shall be entitled to receive back his deposit or purchase-money, and to be paid his costs, charges, and expences occasioned by his bidding for and being declared the purchaser of the property, and of and incidental to his application to be discharged including the costs of investigating the title and of obtaining Counsel's opinion. (e) If there be a fund in Court standing to the credit of the cause, the purchaser's taxed costs, charges and expences may be ordered to be paid out of it; but if there be no such fund, the costs, charges and expences may be ordered to be paid by the party having the carriage of the proceedings, or otherwise as the Judge may think fit, without prejudice to the question by whom such costs, charges and expences shall be ultimately borne and paid.

A purchaser of immovable property, or of any right, title, or interest in such property, who pays his purchase-money

(e) *Barton v. Brown*, 4. Ir. Eq. Rep., 607.

into Court without his right to object to the title being reserved, or who enters into possession, shall be deemed to have accepted the title.

On the purchase-money for immovable property being paid, the purchaser [except in cases in which the legal estate is already in him, and the equitable estate has passed to him by virtue of the sale so as to complete his title] shall be entitled to a proper conveyance, in which all necessary parties shall join as the Registrar shall direct.

Unless otherwise ordered, the conveyance shall be prepared by, and at the expense of, the purchaser, and shall be sent for approval to the attorney of the party having the conduct of the proceedings.

If there be any improper delay in perusing and returning the conveyance to the purchaser, he may apply, on summons, for the return thereof to him, and such order shall be made thereon and as to costs as to the Judge shall seem fit.

Subject to appeal to a Judge, every conveyance shall be settled by the Registrar, if the parties differ about the same, or if any of them be under any legal disability.

If any person certified by the Registrar to be a necessary party to conveyance be a minor, or otherwise under disability, or being *sui juris*, shall neglect or refuse to execute the conveyance, an order may be obtained, in the case of a person under disability, directing the Registrar to execute the conveyance for him and in his name, and, in other cases, directing the person to execute the conveyance within a time to be fixed by the order, in default thereof directing the Registrar to execute the same for him and in his name. The application shall be on summons, and shall be supported by an affidavit or affirmation of the facts, and it shall be shown that the person required to execute the conveyance was certified by the Registrar to be a necessary party, and that the conveyance has been approved of by such

party or by the Registrar. Unless otherwise ordered, the costs

Costs of such application, in the case of a person under disability, shall be part of the costs of the sale, and in other cases, shall be borne and paid by the defaulting party.

No bidding shall be opened, except with the consent of the purchaser, or unless it be shown that there has been fraud or misconduct in the management of the sale, or that the purchaser by reason of being in a fiduciary position was disqualified from purchasing.

A party to the cause may obtain leave to bid at the sale. Such leave, if not contained in the decree or order directing the sale, may be obtained on summons; but the costs of a separate application, unless otherwise ordered, shall be borne and paid by the applicant.

Leave to bid will not be given to a guardian *ad litem*, nor to a receiver; nor without the consent of the parties, to an executor in the suit, or a trustee of the estate, unless the Court is satisfied that an advantageous sale cannot be otherwise effected.

When a sale is ordered at the instance of a subsequent incumbrancer or of a mortgagor, or when a party ^{Reserved bid-} having the carriage of the proceedings has obtained leave to bid, unless otherwise ordered, or unless dispensed with by the proper parties, a reserved bidding shall be fixed by the Registrar. The Registrar may also in any other case in which it may be deemed necessary or desirable fix a reserved bidding. Unless otherwise ordered, the reserved bidding shall not be divulged to any person either before, at, or after the sale.

Upon sales by Court of land—earth, coal, stone or mineral may be excepted, and any rights or privileges may be reserved, and the Court may require the purchaser to enter into any covenant, or submit to any restrictions, which it may deem advisable. (f) And the Court is in every case of such a sale to direct who is to convey, and if there be any infant in the suit whose rights are affected, the Court may appoint an officer thereof to execute the deed of conveyance on behalf of the infant.

(f) Lord St. Leonard's Handy Book of Property-Law, 7 Ed., p. 142.

Section 5.—Of Sales by Receiver under Order of Court.

The receiver in a suit is nothing more than the hand of the Court for the purpose of holding the property of the litigants whenever it is necessary that it should be kept in the grasp of the Court, in order to preserve the subject matter of the suit *pendente lite*; and the possession of the receiver is simply the possession of the Court. He has no personal rights in the property, nor can he take any steps with regard to it, without the sanction of the Court. If it is necessary for him to take action of any sort, he should be put in motion by the Court on the application of the parties to the suit; and whatever he rightly does with regard to the property, he does simply as the agent of the owners of the property. (g)

Property in the hands of the Receiver of the High Court cannot be proceeded against by attachment in the Mofussil. (h) In *Beer Chand Gossain v. Hogg* (i) an injunction was granted by the High Court to restrain proceedings in the Mofussil against the Court Receiver.

By a decree of the High Court obtained by D M (mortgagee) in November 1871 in a suit on a mortgage brought by him against B C and P C, it was ordered that the suit should be dismissed against P C; that the amount found due on the mortgage should be paid by B C to D M; that the mortgaged property, some of which was in Calcutta and some in the Mofussil, should be sold in default of payment, and any deficiency should be made good by B C. The property in Calcutta was sold under the decree, and did not realize sufficient to satisfy the decree. D M, thereupon, in August 1873, obtained

(g) *Wilkinson v. Gangadhar Sirkar*, 6 B L. R., 486

(h) *Hem Chunder Chunder v. Prankristo Chunder*, 1 L. R., 1 Cal., 403.

(i) *Coryton's Rep.*, 56.

an order for the transfer of the decree to the Court of 24-Pur-gunahs for execution : after the transfer B C died in December 1874, leaving a widow and an adopted son his representatives, against whom the suit was revived. The decree, however, was returned to the High Court unexecuted.

In a suit for partition of the estate of R C deceased, brought by P C against B C in the High Court, a decree was made in February 1871 for an injunction to restrain B C from intermeddling with the estate or the accumulations, and for the appointment of the receiver of the Court as Receiver, to whom all parties were to give up quiet possession. B C was in this suit declared entitled to a moiety of the property in suit. *Held*, on application by D M to the High Court for an order that the receiver should sell the right, title and interest of the widow and son of B C in the estate in his hands to satisfy the balance of his debt, that D M was entitled to an order that B C's interest in the property in the hands of the receiver should be considered as attached, that the receiver should proceed to sell that interest, and that for the purpose of carrying out the sale, B C's representatives should join in any conveyance which might be necessary. (j)

Where the receiver is employed by Court to sell any portion of the property *in custodia legis*, he is under no restrictions whatever as to selling the same with or without special conditions of sale. When the property is sold under such an order the receiver as a rule of practice joins in the conveyance, for being receiver in possession it is practically necessary he should do so, and the usual conditions of sale show that he intends to join. (k) Mr. Justice Phear was, however, of opinion that the receiver in such cases is not a necessary party by the fact of his being in possession. In *Wilkinson v. Gungadhar Sirkar* (l) he said :—" Mr. Justice Macpherson thought that, when the receiver sells under an order of the Court, inasmuch as he is in possession of the property, it is practically

(j) *Hem Chunder Chunder v. Frankisto Chunder*, 1 L. R., 1 Cal., 408—6.

(k) *Per* MACPHERSON J in *Biswas v. Biswas*, 6 B. L. R., 493 (note).

(l) 6 B. L. R., at pp. 493—94. See also *post* p. 254—55.

necessary that he should join in the conveyance. I must say I have a very strong opinion that this is not so. It is not necessary that any one should join in a conveyance of property, simply because he is in possession of it, though it is always necessary that he should be joined when he has any interest in it, which must be the case of course if he is in possession by right of lien; and I think it probable that it was possession of this sort which was present to Mr. Justice Macpherson's mind when he delivered his judgment in *Biswas v. Biswas*. (n) But the receiver's possession is not possession by any personal right. It is the possession of the Court, and he is totally devoid of any interest in the property. It appears to me that the order of the Court that the property should be sold by the receiver does not impose any liability or responsibility on the receiver, which is not borne by the officer of the Court, who usually carries out orders for sale in the absence of any express nomination of the person who should do so. I apprehend that the order of the Court that the property in suit should be sold is merely operative on the parties to the suit. It binds them, willing or unwilling, to the sale of the property which will be made under the order. Some one must, of course, act as the agent; and when any of the owners abstain from taking part in it, or are under any disqualification, the person must be some one appointed by the Court. The order that the receiver do sell specifies that the receiver is to sell instead of the ordinary officer of the Court."

Where the receiver in a suit had, by order of Court, sold certain property in the suit, and had executed performance by Receiver. the contract of sale in his own name, a plaintiff praying for specific performance against the purchaser for refusing to complete the contract, was admitted with the receiver as co-plaintiff, he having obtained leave to sue. (n) "The receiver," said Mr. Justice Phear, "has no interest in the property; he in entering into the contract of sale, acted solely as agent, to

(n) 6 B. L. R., 492—93. See also *post*, p. 254—55.

(n) *Wilkinson v. Gangadhar Surkar*, 6 B. L. R., 486.

the knowledge of everybody concerned, and *not* as principal. In all suits for specific performance, it is above all things necessary, that there should be mutuality between the parties."

Where certain property, the subject-matter of a suit, in which the Court Receiver had been appointed receiver, was sold in pursuance of an order of Court made by consent of parties—*held* that an application by the Court Receiver for an order that the purchaser do complete the purchase according to the conditions of sale must be refused as *not* being made in proper form. A sale of property under an order of Court by a person appointed receiver in a suit is not a sale by the Court. The fact that such person is the Court Receiver does not place him in a different position. (c) Mr. Justice Macpherson in refusing the application delivered the following judgment:—"This is an application made upon petition by Mr. Hogg, the Court Receiver, for an order that the purchaser of certain property which was sold by the receiver, under an order of Court, do complete the purchase according to the conditions of sale; and that, in default, he may be attached, or a re-sale of the property at his risk may be ordered. In no book of practice can I find any authority for saying that a sale of droptery by a receiver is, in any sense, a sale by the Court; and nowhere do I find that a sale by a receiver has been treated as a sale by the Court. But it is true that, in some cases, sales by a receiver have been confirmed by this Court, preparatory to possession being ordered to be delivered to the purchaser, the receiver not being at liberty to give possession without an order. An instance of this occurred on the 21st of December last, when an order was made in the suit of *Monmothonth Dey v. Ashutosh Dey*, confirming a sale by the receiver and ordering the purchaser to be put in possession. When a sale is by the Court, the ordinary decree is simply that the property be sold with the approbation of the Court. The order made in this case is an order, by consent of all parties, that the receiver be at liberty to sell, and do sell, 'for

Distinction
between Court-
sales and sales
by the Receiver.

(c) *Chunder Nath Biswas v. Biswa Nath Biswas*, 6 B. L. R., 492.

the best price he can get for the same by public sale, with the privity, consent, and concurrence of the solicitors of the plaintiff and of the defendants,'—the power given to the receiver being independent of any further interference by the Court, save that the conveyance is to be settled by a Judge if the parties differ. When the sale is by the Court, the Registrar, following the practice of the Master, inquires into the title with a view to preparing the conditions of the sale. And after the sale, a purchaser who has not accepted the title is entitled to have an inquiry as to the title, and *the Court will not knowingly pass off an absolutely bad title by means of special conditions*. The receiver being empowered to sell with consent of the parties, is under no restrictions whatever in this respect. In saying this, I do not mean to say that sales by the Court do not often, under special circumstances, take place under conditions similar to those under which the sale which is the subject of this application was made. When the receiver sells under such an order, he joins in the conveyance ; being receiver in possession it is practically necessary he should do so ; and conditions of sale in this instance show that the receiver intended to join. When, however, the sale is by the Court, the *parties* alone convey, and the officer of the Court does not join. Finally, when the sale is by the Court, if the purchaser fails to complete, and the interference of the Court becomes necessary, one of the parties to the suit is the proper person to apply (and is the person who in practice does always apply) to the Court, and put the Court in motion. The Registrar or officer conducting the sale on behalf of the Court never applies. Here the receiver applies himself, showing thus that he does not consider that his position is the same as that of the Registrar conducting a sale held by order of Court. The fact that Mr. Hogg is the Court Receiver does not, as it seems to me, place him in a different position from that which any other person appointed receiver in the suit would have filled. The application must be dismissed with costs, as being one which ought not to have been made in this form."

Section 6 —Of Sales of Ancestral Property.

If the heir of a deceased Hindu or Muhammadan has sold to a *bona fide* purchaser property which he has inherited, he is responsible for the assets received, but the property cannot be followed in the hands of the purchaser. (p)

^{Sale by the}
^{eldest brother.} In the absence of authority in the eldest brother from his brothers to sell their rights, the sale by the eldest brother is not the act of all the brothers. (q)

By the Muhammadan law an heir, like an executor, may properly sell portions of the estate of the deceased, if necessary, for the purpose of paying debts or legacies or otherwise in the course of a due administration of the estate : and there is nothing to invalidate the title of a *bona fide* purchaser who pays full consideration and buys without notice of there being any reason why the sale should not have been made. (r)

A purchaser from the heirs of a deceased Muhammadan is not bound, as if he were dealing with a Hindu widow, to enquire into the existence of a legal necessity ; and even when the property is sold in execution of a decree, he is not bound to ascertain whether it is sold for ancestral debts or for the private debts of the judgment-debtors. (s)

Under the law of the Mitáksharâ each son upon his birth takes a share equal to that of his father in ancestral immovable estate, and can compel his father to make partition of such estate. The rights of the co-parceners in a joint Hindu family consisting of a father and his sons do not differ from those of the co-parceners in a like family consisting of undivided brethren,

(p) *Ram Golam Dobe v. Ayma Begum*, 12 W. R., 177.

(q) *Kam Ohund Bux v. Bindoobashni Dossee*, 7 W. R., 298.

(r) *Syed Shah Enayet Hossein v. Syed Ramjan Ali*, 10 W. R., 216.

(s) *Mt. Wahidonnissa v. Mt. Subraittum*, 14 W. R., 239.

except in so far as the sons are affected by the obligation of the Hindu law to pay their father's debts, and by the fact that he is naturally the manager of the joint family estate.

It is a settled law in the Madras Presidency, that one co-parcener may dispose of ancestral undivided estate to the extent of his own share, even by private conveyance, whether for value or by gift.

In the Bombay Presidency, unauthorized alienations voluntarily made by one co-parcener, are good, even for his own share, only when made for value.

In Bengal, the law which prevails in the other Presidencies as to alienation by private deed has not yet been adopted, but it is now settled, that the purchaser of the undivided property, sold in execution of a decree during the life of the debtor for his separate debt, acquires the debtor's interest in such property, with the power of ascertaining and realizing it by partition.

Under the Hindu law, subject to certain limited exceptions, the whole of the undivided estate of a joint family is liable in the hands of sons for the debts of their father. Accordingly, where ancestral property has passed out of the family, either under a conveyance executed by the father in consideration of an antecedent debt, or in order to raise money to pay off an antecedent debt, or under a sale in execution of a decree for the father's debt, his sons, by reason of their duty to pay their father's debts, cannot recover that property unless they show that the debts were of a kind for which they would not have been liable, and that the purchasers had notice to that effect; and a purchaser at an execution-sale, being a stranger to the suit without such notice, is not bound to make enquiry beyond what appears on the surface of the proceedings.

In a suit by the members of an undivided Hindu family governed by the law of the Mitāksharâ, to set aside a sale of joint ancestral property which had been sold in execution of a decree obtained against their deceased father, on the ground that the debt was not one for which such property could be

made liable, it appeared that prior to the sale, the plaintiffs had preferred a claim of objection thereto on the same grounds, and that the Court of execution had declined to adjudicate the claim, and had directed the sale to proceed, referring the claimants to a regular suit. *Held*, that the purchasers at the execution-sale must be taken to have had notice, actual or constructive, of the objections made to the sale by the plaintiffs, and of the order passed thereon by the Court, and to have purchased with knowledge of the plaintiff's claim, and subject to the result of their suit. *Held* also, that the property having been attached for the debt of the co-sharer during his life-time, the sale was good for his share, but, that as it appeared on the evidence in the suit that the debt was one for which, according to Hindu law, the other co-sharers could not be made liable, the sale was not good for their shares. (*m*)

Ancestral property which descends to a man under the Mitāksharâ law is not exempted from liability to pay his debts because a son is born to him. It is a pious duty on the part of the son to pay his father's debts, and the ancestral property in which the son, as son, acquires an interest by birth is liable to the father's debts, unless they have been contracted for immoral purposes. The Mithilâ law is the same. Where a father has sold ancestral property for the discharge of his debts, if the application of the bulk of the proceeds has been satisfactorily accounted for, the fact that a small part is not accounted for, will not invalidate the sales.

A son cannot, under the Mithilâ law, set aside the sale of ancestral property by his father for the discharge of the father's debt, and oust the purchaser. It is doubtful whether a son can under the Mitāksharâ law recover an undivided share of ancestral property sold by his father.

A son is not entitled under the Mithilâ law to any interest in ancestral property sold by the father before his birth. (*n*)

(*m*) *Suraj Bansi Koer v. Sheo Pershad Singh*, I. L. R., 5 Cal., 148—49

(*n*) *Girdhāree Lall v. Kantoo Lall*, I. R., 1 I. A., 321; 14 B. L. R., 187. See also *Bika Singh v. Luchman Singh*, I. L. R., 2 All., 800—5.

Under the Mitāksharâ and the Mayukha, the son takes a vested interest in ancestral estate at his birth. But that interest is subject to the liability of that estate for the debts of his father and grandfather.

The ancestral property of a Hindu father may be sold either by himself or by a Civil Court having jurisdiction, in satisfaction of his debts, not contracted for illegal or immoral purposes, and such sale will bind sons *in esse* at the time of the sale. (o)

Ancestral property may be sold by a father to effect his release from prison. (p)

Under Hindu law where there is found to be an ancestral debt, and a sale is effected to pay it, the purchaser at such sale is not bound to enquire whether the debt could have been met from other sources. (q)

The rights of a Hindu son under the Mitāksharâ law during his father's life-time in ancestral property, *viz.*, a right of joint enjoyment thereof under the father's management, and a right to partition under certain circumstances, together with the right of succeeding the father in the management after his death, may be vested rights, and are undoubtedly of an incipient proprietary character, but they do not constitute a transferable or inheritable property, and they cannot survive the person in whom they are vested. (r)

A, a Hindu, sued B, the widow of C, claiming to be entitled with others as heirs of C under the Mitāksharâ law to certain property. The suit was compromised on the terms, as to one portion of the property that it was to be retained by B for life, and after her death to be divided according to specified shares between A and the other claimants. After B's death, A obtained possession of his share under the deed

(o) *Narayanacharya v. Narsokrishna* I. L. R., 1 Bom., 262. See also *Girdharse Lall v. Kantoo Lall and Mudden Mohun Thakoor v. Kantoo Lall*, L. B., 1 I. A., 321; S. C., 14 B. L. R., 187.

(p) *Duleep Singh v. Shree Kishon Pandey*, 4 N. W. P. H. C. Rep., 83.

(q) *Ajayram v. Girdharse*, 4 N. W. P. H. C. Rep., 110.

(r) *Gooprased v. Sheodan*, 4 N. W. P. H. C. Rep., 137.

of compromise. A alienated the property, and during his life-time his son sued to set aside the alienation on the ground that it was ancestral property. It was held, that A took the property absolutely, and not as ancestral property. "It is going

Purchase how too far to hold," said Mr. Justice Jackson, "that if family embarrassment exists such as 'is about to cause the sale of valuable landed property, it is not sufficient to entitle the purchaser to relief that he should show the existence of such embarrassment, but he must enquire into the circumstance connected with that debt, must go into the history of the matter in which the embarrassment originated, and trace back the whole chain of transactions from the beginning. This is not borne out by the decisions of the Privy Council upon this point." (s)

Under the Mitâksharâ law, when a sale of ancestral property by the father has been set aside in a suit by the son, on the ground that there was no such necessity as would legalise the sale, and that the son had not acquiesced in the alienation, the son is entitled to recover the property without refunding the purchase-money, unless such circumstances are proved by the purchaser as would give him an equitable right to compel a refund. (t)

In justifying the purchase of ancestral property, the purchaser is not bound to prove the fact that family necessity actually existed ; it is sufficient if he establishes that he made *bonâ fide* inquiry into the matter, and was in that inquiry reasonably led to suppose that the necessity did exist. (u)

According to *Sadabart Prasad Sahu v. Foolbash Koer*, (v) a sale of undivided ancestral property by a father without any legal necessity and without the consent of all the co-sharers is, under the Mitâksharâ law, invalid. It is not valid even as regards the father's share. A son going to set aside such an

(s) *Mahabir Kumer v. Jubha Sing*, 8 B. L. R., 38 ; 16 W. R., 221.

(t) *Madhuo Dyal Singh v. Kulbur Singh*, B. L. R., Sup Vol., 1018.

(u) *Soorendro Pershad Dabey v. Nundun Misser*, 21 W. R., 196.

(v) 3 B. L. R., F. B., 31.

alienation is, according to that case, entitled to a declaration that the alienation is void altogether. The son suing in the father's life-time, on behalf of the family may be entitled to a decree for possession. Upon what terms that decree should be made will, according to the decision in *Mulhon D el Singh v. Golbur Singh*, (w) depend on the equity which the purchaser may have to a refund of the purchase-money, or to be placed in the position of an encumbrancer as against the joint family in the particular case (x) The Madras High Court has, however, held that a sale by a father is valid by Hindu law to the extent of his own share of the undivided estate. There is no distinction according to the Madras school between a father and other co-parceners. (y)

Mr. Justice Field in one of his learned judgments thus laid down the law as to the sale or mortgage of joint family property by a father governed by the Mitâksharâ Code :—I. A father governed by the Mitâksharâ law may alienate the family property to discharge debts incurred by him for purposes not illegal or immoral.

II. If the son seeks to set aside such alienation as to his own interest, he will have to show that the purposes of the alienation were illegal or immoral.

III. If the son, being adult, has joined in the conveyance, or led the alienee by his conduct to suppose that he assented to the alienation, he will be estopped from disputing its validity.

IV. These propositions apply to a mortgage, so as to place the purchaser at an execution-sale under a decree upon the mortgage-bond in the position of an alienee by private sale.

V. If the son has been a party to the suit in which the decree upon the mortgage-bond was obtained he is concluded.

VI. But if the son has not been a party to the suit, he is not concluded, but must show that the original debt was con-

(w) 9 W. R., 511 See also B. L. R. Sup Vol, 1018.

(x) *Honuman Dutt Roy v. Bhugbul Kishen & Kishor Narayan Singh*, 8 B. L. R., 358; 15 W. R., F. B., 6. [See ante p. 257.

(y) *Palaniwellaippu Kaundan v. Mannaru Nulkan*, 2 Mad. Rep., 416.

tracted for illegal or immoral purposes, in order to recover his share of the property from the purchaser.

VII. Where the father has neither aliened nor mortgaged the family property, but it is sought by suit to make that property liable to satisfy a debt incurred by the father, the son, as well as the father, must be a party to the suit.

VIII. When the creditor sues the father alone for a debt contracted by him alone, and in execution sells the right, title and interest of the father only, the purchaser at this sale does not take the son's interest.

IX. A suit by a Hindu governed by the Mitāksharā law, to recover possession of property sold during his minority by his father, is within time if brought within three years after he attains the age of twenty-one. (z)

Under the Mitāksharā law, a son is entitled to recover from a purchaser from his father ancestral property improperly sold by the father, and in the absence of proof of circumstances which would give the purchaser an equitable right to compel a refund from the son, the latter would be entitled to recover without refunding any part of the purchase-money. But if it is proved that the son got the benefit of his share of the purchase-money, the son must refund his share of the purchase-money before he can recover his share of the property sold. And where the purchase-money has been applied to pay off a valid incumbrance on the estate, the right of the son to recover will be subject to that of the purchaser to stand in the place of the incumbrancer. The *onus* in such cases to prove the application of the purchase-money lies on the purchaser. (a) "It appears to us," said the Calcutta High Court, "that as the Mitāksharā law gives a son an equal right with the father in the matter of alienation, it must give him that right absolutely; and that a son seeking to set aside imprudent or unnecessary sales made by a father, is not bound to refund to the purchasers.

Son's right to recover possession. Refund of purchase-money. *Onus probandi*.

(z) *Ramphul Singh v. Degnaran Singh*, 1 L. R., 8 Cal., 517. [260 (t).]
(a) *Modhoo Dyal Singh v. Golbur Singh*, 9 W. R., 511. See *ante* p.

If it were so, he would not succeed on his right as a son, but on his power as a man of substance. A poor man would be virtually deprived of the right which the Mitāksharâ law undoubtedly gives him.

“Cases of this sort appear to us to be those in which the maxim of ‘*caveat emptor*’ should be strictly applied. Every purchaser in the Mithilâ districts knows perfectly well the nature of a father’s rights in ancestral property; and if he chooses to purchase, without first securing the consent of the heir, or without assuring himself of the existence of a necessity, he has only himself to blame if the son recovers possession of what has been improperly taken from him. He appears to us to have no claim to equitable consideration.” (b)

When a sale, effected by the representative of the joint family, the *kartâ* or guardian, is impeached on the ground that it was not justified by necessity, it is only incumbent upon the defendants who purchased in the belief that there was such necessity to show that they had made all reasonable enquiries under the circumstances which attended the case, and had reasonably been led to the belief that there *was* such necessity. (c) Mr. Justice Phear in dismissing an appeal against a *bond fide* sub-purchaser for value without notice thus expatiated on the rule of law on the subject:—“In the case before us the defendants purchased, as I may say, second-hand, five or six years after the property had been originally sold by the father, and during the whole of this time the present plaintiffs stood by quiescent, and did not in any way interrupt or interfere with the enjoyment of the property by the father’s vendee. That fact alone, it seems to me, ought to go a long way to satisfy a *bond fide* purchaser from that vendee that the original transaction had been a good and valid one. He cannot by the nature of the case have it in his

(b) 9 W. R. pp. 511—12,

(c) *Per* PHAR, J., 11 B. L. R., App. 29. See *ante* p. 55 (s).

power to make narrow enquiries into the circumstances which led to the sale of the family property five years before the time at which he purchased, and a comparatively little enquiry, supported by the evidence of *bona fides* in his case, ought I think to be sufficient to afford a good defence to the man who stands in that position. But whether this be so or not, it is very clear to my mind that even if the plaintiffs are in strict law entitled to say to the defendants 'you have obtained no legal title to this property, it is family property which our father had no power to alienate, and we call upon you to deliver it back to the family,' yet they certainly cannot do that without offering at the same time to refund to the defendants the money with interest which they paid as consideration for their purchase. The Court could only grant a decree for the recovery of the property by the joint family upon those terms, because it would be intolerable that it should be in the power of the adult members of a joint family to stand by, to see the property sold to persons who *bona fide* gave money for it, to remain quiet in view of these facts for a period of ten years without in any way, disputing the enjoyment of the property obtained under that alienation, and then that they should come into Court and be allowed to say 'although we have stood by for these ten years, we have not stood by for twelve years, and therefore we can claim to have the property given back to the family without re-imbursing you a single pice.' It seems to me that it is a very plain matter of equity and justice that, if the plaintiffs under circumstances like these seek to recover back the family property which they have allowed for these years to remain out of the family, they can only do so under the condition of refunding to the purchasers the money which they paid for the purchase." In this case the appellants made no offer to refund the purchase-money, and the appeal was consequently dismissed on the principle that he who seeks equity must do equity. (d)

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(d) *Surub Narain Chowdhry v Shew Gabind Pandey*, 11 B. L. R., App. 29-30. See also *Mudhun G. Thukoor v. Ram B. Pandey*, 8 W. R., 71.

Where a joint family property was sold, in order to raise money to redeem other property which had been mortgaged, and was about to be foreclosed, and there was nothing to show that the transaction was not for the benefit of the family, the sale was declared to be good: and it was held that, as a large sum was due on the mortgage, the purchaser was not bound to enquire into the original necessity for giving the mortgage. The rule that only so much of the property should be sold as will meet the necessity, does not apply to cases where the excess is small, or where the money really required cannot be otherwise raised. (e)

In a suit to avoid alienations effected by plaintiff's father at a time when plaintiff was living in commensality with his father as a member of a joint family, which suit was brought after 12 or 13 years had been allowed to go by without any objection save the filing of a petition of protest in a Court of Justice, whereof the vendees were not made aware: it was held by the Calcutta High Court that the plaintiff having lain by for so long as he has done must, under the circumstances, be taken to have consented to the alienations. (f)

Assuming that an alienation by a father, who at the time of such alienation was a member of a Hindu family living in commensality, may be questioned by a son, it will have to be seen whether the alienation was made for purposes which justified it. (g)

The three senior members of an undivided Hindu family—the remaining member of which had disappeared—setting forth a ground of necessity, executed to the plaintiff, in November 1870, a mortgage, duly registered, of a piece of land which formed part of the family estate. Certain judgment-creditors of the absent member subsequently attached and sold his share in the said land under their decree. The plaintiff's undivided

(e) *Per MACPHERSON and SETON KARR JJ.—Baboo Luchmeedhur Sing v. Ekbal Ali*, 8 W. R., 75.

(f) *Ramkishore Narain Sing v. Anund Misser*, 21 W. R., 12—13.

(g) *Noor Ahmed v. Lutta Pershad*, 2 N. W. P. H. C. Rep., 189.

son purchased it, and in 1872 re-sold his right, title and interest in it to the defendant's father, without disclosing the facts of his father's mortgage, but without any active fraud on the part of himself or his father to suppress the fact from the knowledge of his purchaser.

In 1874 the plaintiff obtained a decree upon his mortgage, and attached the land. In a suit by the plaintiff to establish his right as against all the land included in his mortgage, *Held* I. That the mortgage being, under the circumstances, a valid one, the sale of the absent son's share was subject to the lien created thereby, which lien was not disturbed by the purchase and subsequent sale of the share by the son of the mortgagee. The origin of the son's title was distinctly stated in the deed of sale to the new purchaser, who, by the facts of its being a sale of a share, was put upon inquiry.

II. That the mere want of disclosure, by the plaintiff's undivided son, of his father's mortgage, was not enough to create an estoppel against his father seeking to establish his claim under the mortgage. "If there had been," said West, J., "any active fraud, any artifice by which the mortgagee, directly or indirectly, had prevented the purchaser from his son from making the reasonable enquiry at the registration office, the case might be different." (*h*)

Mere production of decrees will not establish the propriety and necessity of a sale of ancestral property. There should be evidence of the nature of the debts on which such decrees originated. (*i*)

A brother acting as manager of the family property, and for the benefit of the minors, although he has not obtained a certificate of guardianship under Act XL of 1858, may make a temporary alienation of the family property for necessary purposes and for the benefit of the minors. (*j*)

Landed property acquired by a grandfather, and distributed by him amongst his sons, does not by such gift become the

(*h*) *E. S. Joshi v. L. B. Joshi*, I. L. R., 2 Bom., 650.

(*i*) *Ramesh Singh and others v. Ramjeet*, 2 N. W. P. H. C. Rep., 50.

(*j*) *Lalla Seetal Pershad v. Chand Khan* 2 N. W. P. H. C. Rep., 428.

self-acquired property of the sons, so as to enable them to dispose of it by gift or sale without the consent, and to the prejudice, of the grandson. (*k*)

The plaintiff's father, as manager of the undivided family, sold part of certain ancestral property to the defendants, who subsequently, in a suit against the plaintiff's father alone, obtained a decree for possession, and subsequently obtained possession thereunder, which they enjoyed for 10 years, when the plaintiff filed a suit to recover the property sold. The deed of sale recited that the purchase-money was required for necessary purposes, but apparently, no evidence was given by the purchasers of the existence of any such necessity, nor, on the other hand, was there any evidence given by the plaintiffs, nor was it even asserted by them that the money was required by their father for immoral purposes, or that the defendants had notice of the fact: *Held* that the plaintiffs were not entitled to recover the property sold. (*l*)

A conveyance by a Hindu, without male issue at the date thereof, will bind his subsequently born or adopted male issue. Such issue at their birth take a vested interest in such property as remains of their father at that time. (*m*)

According to the Bengal School the father's power of alienation of ancestral property is *absolute*. He may dispose of his property, movable or immovable, ancestral or self-acquired, as he pleases, by gift, sale or otherwise (*n*)

A manager of a family estate who receives the rents, has no power to sell the property of an adult member, (*o*) but he can sell his own share therein. (*p*)

According to Malabar law, a sale of family property is valid when made with the assent, express or implied, of all the

(*k*) *Muddun Gopal Thakoor v. Ram Buksh Pandey*, 6 W. R., 71.

(*l*) *Dursu Pandey v. Bikramajit Lal*, I. L. R., 3 All., 125

(*m*) *Rambhat v. Lakshuman Chintaman Mayalay*, I. L. R., 5 Bom., 630. See also *Doolichand v. Woomasunkur Purnad*, 7 Calc. L. R. 429. [159.

(*n*) *Ummal v. Ohetty*, M. I. A., 344. *Tagore v. Tagore*, 4 B. L. R., O. C.,

(*o*) *Koylasessur Bose v. S. M. Naraines Dossee*, 10 W. R., 303.

(*p*) *Damodar Pithal Khari v. Dumodar Hari Soniana*, 1 Bom. H. C. Rep., 183.

members of the tarawâd, and when the deed of sale is signed by the karanavan and the senior anandravan, if *sui juris*. Such signature is *præstis facie* evidence of the assent of the family, and the burden of proving their dissent rests on those who alleged it. (q) The assent of the anandravans is necessary to a sale of tarawâd land by a karanavan. The chief anandravan's signature to the instrument of sale is sufficient, but not indispensable, evidence of such assent. (r)

In an undivided Hindu family comprising infant members, there must of necessity be some person to manage its concerns; and if the manager sell family property to carry on the family trade and business, if such act be necessary and for the general good, it will be valid. A purchaser from such manager is only bound to enquire *whether the money is wanted for legitimate purposes*, and if satisfied that it is, and if he in good faith believes that the vendor was the manager, he will be entitled to protection against the claim of any member of the family who is a minor at the time the transaction takes place. The minor in such cases is bound by the acts of the manager. (s) A sale by a manager with necessity may be valid, although the vendor does not describe himself as manager. (t)

A, died leaving B, a grandson by a son deceased, C, the widow of another son deceased, and D and E, sons, him surviving. All four held separate possession of their respective shares in the estate. C sold her share, for Rs. 995, to pay off a debt of A's, of Rs. 670. D and E having waived their rights, B sued as reversioner to set aside the sale made by C. It was held that C did no wrong in selling her share to pay off the debt, and the mere fact that she sold it for more than the amount of the debt, did not render the sale invalid. (u)

(q) *Kindi Menon v. Srunginreayatta Ahammuda*, 1 Mad. H. C. R., 284.
 (r) *Kapreta Ramen v. Makkajit Mutoren*, 1 Mad. H. C. R., 359.
 (s) *Trimbak Anant v. Gopal Shet*, 1 Bom. H. C. R., 27. See also *Bemola Dossee v. Mohun Dossee and others*, 1 L. R., 5 Cal. at p. 805.
 (t) *Jodunath Chuckerbutty v. James Tewdee*, 11 W. R., 26.
 (u) *Lala Chatranarayan v. Uba Kunwari*, 1 B. L. R., A. C., 201.

Section 7 (A).—Of Sales by Hindu Widows.*

It has been laid down by the Privy Council, and the doctrine has been constantly followed in India that the Hindu widow's power of alienation for *spiritual purposes* is larger than the power of alienation to which necessity gives rise. It has been long settled that she is not, in any proper sense, trustee for the heirs : she has the whole inheritance in her with a limited power of alienation—a power of alienation which can only be exercised, in two classes of contingencies,—one class comprising cases of necessity, and the other class, cases of raising money for spiritual purposes. (v)

With respect to immovable property inherited from her husband, a Hindu widow is little more than a tenant for life, and trustee for the heirs of her husband, and she is restricted from alienating it by her sole independent act, unless for necessary subsistence, or for purposes beneficial to the deceased. (w)

* According to the Hindu law, a widow who succeeds to the estate of her husband in default of male issue, whether she succeeds by inheritance or survivorship—as to which see the *Shivagunga* case, 9 Moore's I. A., 604—does not take a mere life-estate in the property. The whole estate is for the time vested in her absolutely for some purposes, though in some respects for only a qualified interest. Her estate is an anomalous one, and has been compared to that of a tenant-in-tail. It would perhaps be more correct to say that she holds an estate of inheritance to herself and the heirs of her husband. But whatever her estate is, it is clear that, until the termination of it, it is impossible to say who are the persons who will be entitled to succeed as heirs to her husband. The succession does not open to the heirs of the husband until the termination of the widow's estate. Upon the termination of that estate the property descends to those who would have been the heirs of the husband if he had lived up to and died at the moment of her death (Moore's I. A., 400). *Per* SIR B. PEACOCK in *Moniram Kolita v Keri Kolitani*, I. L. R., 5 Cal. at p. 789.

(v) *Per* PHEAR J.—in *Mutteeram Kuwar v. Gopal Sahoo*, 11 B. L. R., at p. 421. *Collector of Mussalipatam v. Cavalry Vencata Narainappa*, 8 M. I. A., 529.

(w) *Beschor Bhugwan v. Bacc Lukmee*, 1 Bom. H. C. R., 56.

The first duty of a purchaser from a Hindu childless widow, Prime duty of a purchaser from a Hindu widow. is to satisfy himself, as an ordinary prudent man would do, as to her right to sell. If he does not do so, he does not act with due care or attention in the matter, and, therefore, cannot be said to have acted legally in good faith, although he may, in fact fully believe or take it for granted that all is right. The Court (Bailey and Macpherson, J.J.) in laying down this rule of law with regard to purchasers from widows observed :—" Good faith in its legal sense means much more than mere absence of bad faith. A purchase from a childless widow, who sells without sufficient necessity, cannot, in our opinion, be said to be made in good faith. Nothing can legally be said to be done or believed in good faith, which is done or believed without due care or attention." (x)

All purchasers from a Hindu widow know or ought to know by this time the extreme risk of such a transaction, and if they choose to run it, and to buy without consulting the next heirs, or without taking such further steps as would enable them at some future time, should necessity arise, to prove that they made diligent and careful inquiry as to the existence of a legal necessity before buying, they must take the consequences. (y)

A widow may sell a portion—a quantum *sufficit*—of her husband's property to defray the expenses of a Pilgrimage to Gayâ. pilgrimage to Gayâ. Mr. Justice Glover in *Mahomed Ashruf v. Brijessurry Dasse* (z) said : " Such a pilgrimage for the soul of the deceased would, undoubtedly, be a religious purpose, supposed to conduce to the spiritual welfare of her husband, which would give a widow a larger power of alienation than she would ordinarily have. But I do not understand that the *srâdh* pilgrimage to Gayâ can be put any higher than a very necessary and meritorious performance. A widow

(x) *Ramdhone Bhuttacharjee v. Ishanee Debee*, 2 W. R., 123.

(y) 19 W. R., 426.

(z) *Ibid.*

ought, perhaps, to perform it : but she is not absolutely bound to do so. It is, I should say, one of those ceremonies for the due performance of which a widow might fairly and properly alienate a moderate portion of her late husband's estate, but that she would not be justified in disposing of the entire property for that object."

Expences incurred by a Hindu widow for a pilgrimage to Gayâ and for the performance of *śrādh* are legitimate expences for which she can alienate her husband's property. Where the amount expended was Rs. 1,700, and the property was sold for Rs. 4,000, it was held in a suit by the heir against the purchaser to have the sale set aside, that the plaintiff having sought to recover unconditionally, and not having expressed his readiness to repay Rs. 1,700 and interest, his suit must be dismissed, (a) inasmuch as such sales are voidable by the heir only upon his offering the real consideration. (b)

A pilgrimage to Benares, however, is not a legal necessity to justify a sale by a Hindu widow. (c)

All that a purchaser from a Hindu widow was bound to show was that he had, prior to his purchase, made reasonable enquiries about the existence of the alleged necessity, and that it was a necessity sanctioned by Hindu law. Where the purchaser gives ample evidence to prove this part of his case, and there is no evidence produced by the plaintiff who seeks to set aside the sale, the suit must fail. (d)

A conveyance of ancestral property by a Hindu widow without proof of necessity can only operate as a conveyance of her life-interest. (e) A mere declaration of necessity is not enough to justify a purchase from her. (f)

Hindu law does not regard "*pious purposes*" as the only "*necessary purposes*" which justify alienation of inherited pro-

(a) *Mutteeram Kowar v. Gopaul Sahoo*, 11 B. L. R., 416—22,

(b) *Phool Chand Lall v. Rughoobuns Sahaye*, 9 W. B., 108.

(c) *Hura Mohun Adhikari v. S. M. Aluckmones Dassie*, 1 W. B., 252.

(d) *Per DWARKA NATH MITTER, J.—Chowdry Junmejjoy Mullick v. S. M. Bussomoyee Dassie*, 11 B. L. R., 418—21 (foot-note).

(e) *Tarini Churun Banerjee v. Nundo Kumar Banerjee*, 1 W. B., 47.

(f) *Gunga Gobind Bose v. Sreemutty Dhumsee*, 1 W. B., 60.

erty by Hindu ladies. Self-maintenance, discharge of just debts, protection or preservation of the estate, may be regarded as such "*necessary purposes*" also. (g) In *Mt. Bhagbutti Dae v. Choolpy Bhulanath Thakoor* (h) the Privy Council observed that a Hindu widow has certainly the power of selling her own estate; that she completely represents the estate of her husband and has the right under certain circumstances, if the estate were insufficient to defray the funeral expences, or her maintenance, to alienate it altogether.

A decree against a Hindu widow for a loan to pay Government revenue, is binding on the reversioner (i)

Where a Hindu widow sells as guardian of her minor son and for his maintenance, the purchaser need only satisfy himself of the *necessity* of the sale, and is *not* bound to see to the application of the money. (j)

The *strâdh* of the widow's husband, the marriage of his daughter, the maintenance of his grandsons, and the payment of the husband's debts are admitted by Hindu law as legitimate grounds of necessity for alienations. (k)

When the legal necessity for a sale by a Hindu widow is questioned, its existence must be shown by the party standing on the conveyance. (l)

In a sale by a Hindu widow under necessity, where the vendee pays a fair price and acts *bonâ fide*, the mere fact of only two-thirds of the purchase-money being paid to creditors, does not invalidate his conveyance, as he is not bound to see to the application of the purchase-money. (m)

A conditional sale is an alienation, the validity of which a reversioner to a Hindu widow is, under the Hindu law, entitled to question. In a suit for mutation of names by a purchaser from

(g) *Suryoo Prasad v. Raja Krishen Pertab Bahadur Sahi*, 1 N. W. P. H. C. Rep., 16 (Per PEARSON and TURNER JJ.)

(h) L. R., 2 I. A., at p. 261.

(i) *Gopal Chunder Manna v. Gourmonee Dassee*, 6 W. R. 52.

(j) *Radhakishore Mukerjee v. Mirtoonjoy Saw*, 7 W. R., 23.

(k) *Lalla Gunput Lall v. Mt Toorun Koombar*, 16 W. R., C. R., 52.

(l) *Bisso Nath Roy v. Lall Bahadoor Sing*, 1 W. R., 247

(m) *Ram Gopal Ghose v. Bullodeb Bose*, W. R., 1864, 385.

a Hindu widow, the purchaser must prove the legality of his purchase if he chooses to bring an action against the reversioner (n)

The payment of a time-barred debt of her deceased husband is not a valid cause for the absolute alienation by a Hindu widow of her deceased husband's immovable estate. An alienation by her of such immovable property is valid for the period of her own life, though the conveyance may purport to convey a greater interest. She has an independent power of sale over immovable property inherited from her husband, to the extent of such life-interest, and no further. (o)

K, a Hindu widow, while in possession, granted a patni lease of property which was afterwards sold under a writ of *fiery facias* and purchased by B. It was held that if there was no legal necessity to justify the alienation, the patnidar acquired no more than the life-interest of the widow; but if there was, then B's purchase was subject to the pattah granted by the widow as a valid alienation of a prior date. (p)

Suit to set aside sale of a moiety of a patni tenure by a widow, and a subsequent and alleged collusive sale for arrears of rent under Bengal Regulation VIII of 1819. *Held* that, if the defendant was in possession under a title from the widow, his subsequent purchase at the auction-sale 6 years before the death of the widow did not give him a new title against those claiming through the widow, especially when the plaintiff alleged that the defendant had allowed the patni to fall into arrears and then purchased it himself. (q)

A conveyance by a Hindu widow, for other than allowable causes, of property which has descended to her from her husband, is *not* an act of waste which destroys the widow's estate and vests the property in the reversionary heirs, and the conveyance is binding during the widow's life. The reversionary heirs will not be

(n) *Odit Narain Sing v. Dhurum Mahoon*, W. B., 1864, 263.
 (o) *Bissonath Chunder v. Radhakisto Mundle*, 11 W. B., 554.
 (p) *Melgirappa bin Solbappa Telu v. Shicappa bin Erappa*, 6 Bom. H. C. Rep., 270 See also *Mayaram Bhairam v. Motiram Gobindram* 2 Bom. H. C. Rep., 331.
 (q) *Woomesh Chunder Mukerjee v. Bissessuree Dabee*, 6 W. B., 8.

precluded, even during the life-time of the widow, from commencing a suit to declare that the conveyance was executed for *causes not allowable*, and is, therefore, not binding beyond the widow's life ; nor will the reversionary heirs be deprived, during the widow's life, of their remedy against the grantee to prevent waste or destruction of the property, whether movable or immovable. (r) It is now, however, well-settled that a widow can alienate her estate, *i. e., she can anticipate the profits.* (s)

A widow may by Hindu law relinquish and so anticipate for the reversioners their period of succession. (t)

A Hindu widow sold a portion of her husband's property under a deed of sale, upon the face of which there was a statement that the property was sold in order to liquidate the husband's debts. It was held that that statement was not sufficient of itself to prove that the property was sold for the purpose stated, but that it was on the party seeking to uphold the sale, to prove by evidence that the property was sold for that purpose.

It was held further that a transaction of this sort may become valid by the consent of all the husband's kindred who are likely to be interested in disputing it, or by such a concurrence of the members of the family as suffices to raise a presumption that the transaction was a fair one and justified by Hindu law. (u)

It has been held and is now statutory law that a party, desirous as a reversioner to obtain a declaration of his rights affected by a sale or gift made by a Hindu widow, must bring his suit within 12 years of the alienation, and that it is a remedy of a different description which is open to him after the death of the widow. (v)

(r) *Gobindmani Das v. Shamlal Busack*, B. L. R., Sup. Vol., 48. See also W. R., F. B., 165 ; 2 Mad. H. C. Rep., 303

(s) *Per AINSLIE, J.*, in *Hunsbutti Kerain v. Ishri Dutt Koer*, I. L. R., 5 Cal. at p. 525

(t) *Protab Chunder Roy Chowdhry v. Sm. Joymonnee Dabee*, 1 W. R., 98.

(u) *Rajlukhee Debya v. Gokul Chunder Chowdhery*, 12 W. R., P. C., 47 ; 3 B. L. R., P. C., 57 ; 13 M. I. A., 209 ; Pandit's P. C. J., Vol. II., 578. See also *Varjiban Rangji v. Ghelji Gokuldas*, I. L. R., 5 Bom., 563.

(v) *Bishonath Surma v. Sm. Shashi Mulshi*, 11 B. L. R., Ap., 1—2. See also *Synd Amir Ali v. Mohendra Nath Bose*, 2 W. R., 271 ; Act XV of 1877, sched. II, art. 125.

There is no rule of Hindu law which compels a widow alienating any portion of her late husband's property to have recourse to a mortgage, instead of to a sale, to raise funds for her maintenance. The question whether she has exceeded her powers or not, depends upon the necessities of the case. (w)

The plaintiff purchased an estate from a Hindu widow in possession, and after his purchase he paid a debt, for which the property sold had been mortgaged by the late husband of his vendor. Subsequently the daughter of the vendor claimed the property as heir of her father, and recovered possession of it from the purchaser by suit. The purchaser now sued the heir for a refund of the amount of the mortgage-debt paid by him. It was held, that the purchaser was entitled to recover. (x)

Where a Hindu widow in possession as such of her deceased husband's property alienates it, only the person presumptively entitled to possess the property on her death may sue for a declaration of his right as against such alienation, unless such person has precluded himself from so suing by collusion and connivance, when the person entitled next to him may so sue. (y)

Mere attestation by a relative does not necessarily import his concurrence to a conveyance by a Hindu widow (z); but the fact of the reversioner being an attesting witness is an acquiescence on his part which precluded him from impeaching the sale on the ground of waste. (a)

Where certain landed property in the possession of a Hindu widow was sold, on the alleged ground of necessity, and the execution of the purchase-deed was attested by the then next heir, it was held that the assent implied in such attestation was not conclusive in law as to the necessity for the sale, though the fact of persons most interested in contesting such a sale

(w) *Nabakumar Haldar v. Bhabasundari Dasi*, 3 B. L. R., A. C., 375.

(x) *Paran Misra v. Harsaram Misra*, 8 B. L. R., App. 55.

(y) *Raghu Nath v. Thakuri*, I. L. R., 4 All., 16.

(z) *Rajlukhee Debya v. Gokul Chunder Chowdhry*, 13 M. L. A., 209.

(a) *Gopal Chunder Manna v. Gourmonee Dasse*, 6 W. R., 52.

being called in to execute the deed is the strongest possible proof of good faith on the part of the purchaser. Where considerable time has elapsed of enjoyment and apparent acquiescence, a purchaser, or one claiming through her son, may be absolved from showing anything more than the fact of sale made to him under some ostensible plea of necessity. (b)

A sale by a Hindu widow of her husband's estate under legal necessity, cannot be set aside upon payment of the amount which it was necessary for the widow to raise, or in the proportion which that sum bears to the amount for which the estate was sold. (c)

A Hindu widow cannot endow an idol with her husband's property or a portion thereof, to the detriment of the reversioners. (d) But she has power, with the consent of the reversionary heirs, to make a valid alienation, for religious purposes, of property, movable or immovable, left by her husband. Where a Hindu widow dedicated property by deed to the worship of an idol, and the property was given to trustees in trust, after the death of the widow, to permit the male heirs of her late husband to receive the rents,—*held* that such heirs were entitled to actual possession and to the rents of the estate, provided they devoted it according to the provisions of the deed to the worship of the idol. (e)

The burden of proving property (the subject of a gift by a Hindu widow) to be *stridhan* rests with those claiming under her. A deed of alienation by a childless Hindu widow of her late husband's property is not good against any one, unless made either with the consent of the immediate heirs, or under one of those exigencies which give a widow a power of sale. (f)

A widow is not competent to alienate property which she has purchased with funds derived from her husband's estate after his death; and purchases with such funds would not belong

(b) *Madhub Chunder Hazra v. Gobind Chunder Banerjee*, 9 W. R., 350.

(c) *Suggeram Heguni v. Juddoobuns Sahai*, 9 W. R., 284.

(d) *Kartick Chandra Chuckerbutty v. Gour Mohun Roy*, 1 W. R., 48.

(e) *Brajanath Baisakh v. Mutul Baisakh*, 3 B. L. R., O. C., 92.

(f) *Sreemutty Chundermonee Dasses v. Joybissen Sircar*, 1 W. R., 107.

to the widows otherwise than as the land from which the money arose belonged to them. (g)

In a suit by reversioners to set aside a deed of sale by a Hindu widow of part of her husband's estate, on the ground that the money which it was necessary to raise could have been raised by other means; it was held that, if the widow sold a larger portion of the estate than was necessary to raise the amount which the law authorised her to raise, the sale would not be absolutely void as against the reversioners, who could only set it aside by paying the amount which the widow was entitled to raise, with interest. *Held* also that, if a widow elects to sell where it would be more beneficial to mortgage, the sale cannot be set aside as against the purchaser, if the widow and the purchaser are both acting honestly. (h)

A Hindu widow, entitled to a life-estate only, granted a patni of the lands. *Held, first*, that this did not work a forfeiture entitling the reversioners to enter. *Secondly*, (Steer J. dissenting) that the reversioners were not entitled to have the patni set aside. *Thirdly*, that the patnidar, being a party to the suit, was entitled to appeal against that part of the decree which declared that the act of the widow has caused a forfeiture of her estate, as well as against the part of it which set aside his patni. (i)

In the case of alienation by a Hindu widow, the mere fact that a sale-istahâr is proved to have been issued about the time of the transfer, is not evidence of necessity. (j)

The purchaser from a Hindu widow who is still living is entitled to possession of the property sold, whether there was necessity for the sale or not. (k)

The *onus* of proving the necessity for a sale by a Hindu widow and the *adequacy* of the purchase-money lies on the purchaser. l)

(g) *Nihal Than and others v. Hur Churn Lall*, 1 Agra Rep., A C., 219.

(h) *Phool Okund Lall v. Rughoobun Suhaye*, 9 W. R., 107.

(i) *Lall Lomder Dass v. Hurrykissen Dass*, Marsh, 113.

(j) *Nund Koomar Mandul and others v. Gayetra Lasseo and others*, 6 W. R., 323.

(k) *Bagooa Jak v. Lall Dass*, 6 W. R., 36.

(l) *Jadunath Sircar v. Sreemutty Sonamonee Dassoo*, Coryton's Rep., 70.

Though a purchaser for value is not bound to prove the antecedent economy or good conduct of a Hindu widow who alienates a portion of her husband's estate, or to account for the due appropriation of the purchase-money, he is bound to use due diligence in ascertaining that there is some legal necessity for the loan, and he may be reasonably expected to prove the circumstances connected with his loan. (m)

Sale made conjointly by a Hindu widow and her daughter, who subsequently pre-deceased her mother, of immovable property inherited by the widow from her husband, in the absence of legal necessity, ordered to be set aside; and the grandsons of the second cousins of the widow's husband held entitled to recover the property on recouping the vendees the expenses incurred on improvements. (n)

A Hindu widow has no greater power of alienation over the profits than she has over the *corpus* of her husband's estate: whatever she purchases out of those profits is an increment to that estate; *secus*, where she holds under a deed which in express terms gives her an estate for life with a power to appropriate the profits. Such a deed must be construed according to the plain ordinary meaning of its terms; and words may not be imported into it, from any conjectural view of its intention, which would have the effect of materially changing the nature of the estate thereby created. (o)

A grant by a Hindu widow, with the sanction and concurrence of the next reversioner, is valid, and creates a title which cannot be impeached on the death of the widow by the person who, but for such grant, would be entitled as heir of her husband. (p)

Where a Hindu widow is empowered by her husband's will to sell his property for the purpose of defraying the expenses of a pilgrimage by her, a

(m) *Kalikumar Chowdhry v. Ramdas Shaha*, W.R., 1864, 154.

(n) *Varjivan Rangji v. Ghelji Gokaldas*, I. L. R., 5 Bom. 563.

(o) *Mt. Bhagbuti Dae v. Chowdry Bholanath Thakoor*, L. R. 2 F. A., 256 See ante, p. 272.

(p) *Raj Bullab Sen v. Oomesh Chunder Eos*, I. L. R., 5 Cal., 44.

sale by her, to a *bonâ fide* purchaser, who at the time of such sale believed and had reason to believe that she was going on a pilgrimage, and that the property was sold and the money raised for that purpose, will be good as against the husband's reversionary heirs where it is shown that the widow went on a pilgrimage. (q) Sir Richard Garth was of opinion that in such a case the sale would be valid even if it were *not* proved that the widow went on a pilgrimage.

A Hindu widow cannot alienate without necessity a house built by her on land inherited by her from her husband out of the savings of her income from immovable property inherited from her husband. (r)

A Hindu widow having infant sons and daughter may sell the real property of those sons for the necessary subsistence of herself and family, if there is no other means of providing for them, and this not only to procure the necessaries of life, but also for shrâd ceremonies and other necessary religious duties and for the marriage portion of a daughter. In cases of emergency she can sell without consulting the relations of her husband. The family being in distress and the relief casual, she is at liberty to sell the immovable property of her husband for such purposes, though the relatives of her husband gave her children casual relief. (s) "Such a power (to sell)," observed Sir Edward Hyde East, C. J., "is founded in necessity and good sense, in a country where there is no public provision for the poor; for otherwise it might happen that a child's life might be sacrificed for the sake of preserving his property. The question in each case, therefore, is whether the necessity, for which the power arises, does in fact exist.....In all cases the law must have a reasonable construction to forward the object of it. *It cannot, therefore, be necessary, to authorize a sale of the infant's property, that the family should be in absolute and urgent want of the necessaries of life at the very moment; or sufficient to take away the*

(q) *Ram Kant Ohukerbutty v. Chunder N. Dutta Roy*, 2 Calc. L.R., 474.

(r) *Fukira Dabey v. Gopi Lal*, 6 Calc. L. R., 66. See *ante*, p. 276 (g).

(s) *Doe dem. Bissanauth Dutt v. Doorgapersaud Dey*, *Morley's Digest* Vol. II., pp. 49—52

power, that they are subsisting at the time upon the charitable donations of their friends and relations, who may at any moment withdraw their help from them. Land is not to be sold at a moment's warning ; but if the family have no certain resource for the future, and no actual means of providing for themselves the decant necessities of life according to their condition, and no regular competent allowance from the family, but only mere casual charity,—this constitutes a reasonable necessity to warrant the sale of the property." (t)

The restriction or limitation upon the widow's right is two-fold, namely, in regard to the power of alienation and also in regard to the persons who succeed to the property upon her death. (u) The same restrictions and peculiarities which attach to the widow's rights in her husband's property, also attached to the rights of other female heirs—mother, grandmother, daughter or the like. (v)

The recital of necessity in a lease is not *per se* legal proof of the existence of the necessity which under Hindu law, may justify an alienation by a mother or grandmother. (v)

Under the Mitāksharā and the Dāyabhāga a daughter inheriting property from her father takes a life-interest only in such property, and has no power of alienation beyond her life-time.* The heir of the father on her death takes the property as heir of the ancestor, and not as her heir. "She is in respect of alienation," said Mr. Justice Phear, "in no better situation than the widow ; and alienation which may be made by her is liable to be called in question by the heir of her father, who will take the inheritance at her death in default of a valid alienation." (w)

(t) Morley's Digest, Vol. II., pp. 51—52.

(u) *Per* PHFAR, J., *Dowlat Koor v. Burmadeo Sahoy*, 14 B. L. R., at pp. 247—8. See also *ante* p. 269 footnote (*).

(v) *Obhoy Ohurn Dass v. Meer Sahab Ali*, 5 W. R., 245.

(w) *Per* SIR BARNES PEACOCK, *Nobin Chunder Ghuckerbutty v. Gooroo Prasad Dass*, B. L. R. Sup. Vol. 1008, at p. 1015.

* It is not so however in Bombay, where daughters have absolute power over inherited party. See *post* p. 286.

A conveyance for good consideration by a Hindu female of her share in a joint family estate, inherited by her from her son, with the consent and in favour of the next heir then living, is a disposition permitted by Hindu law, and after the death of the donor vests the absolute estate in that share in the donee. Generally speaking, such alienation of property by gift, sale or mortgage is justified only by necessity or requires the consent of husband's relatives or at least of his nearest relations. (a)

A Hindu, by a petition to the Collector of Patna, recited the deaths of his son, of his brother without leaving issue, his brother's wife, and his own wife, and then proceeded to dispose, as if by testament, of his property as follows :—"Only D K, widow of my son, who, too excepting her two daughters born of her womb, S and D, has no other heirs, is my heir. Except D K none other is, nor shall be, my heir and malik..... Furthermore, to the said D K, too, these very two daughters named above, together with their children who, after their marriage, may be given in blessing to them by God Almighty, are and shall be heir and malik." D K survived the testator : S pre-deceased him without issue : D, the other grand daughter survived him and then died leaving S R, her only son and heir. D K, in 1854, after the testator's death, sold part of the ancestral lands mentioned in the petition to M for Rs. 41,000, of which Rs. 14,000 were devoted to pay off a mortgage thereon.

In a suit by S R against M and D K, to protect his future right and title to the property sold by cancelment of the deed of sale,—*held*, that the intention of the testator must be construed to have been that D K should not take an absolute estate, but that she should be succeeded therein by her two daughters. D K, therefore, could not convey to M an estate beyond her own life, and S R was entitled to a decree declaring his right to the property on the death of D K, credit being given to M for the Rs. 14,000 paid by him in respect of the mortgage, which otherwise S R, the heir would have had to

(a) *Sm. Jailoomney Debee v. Saroda P. Mukerjee*, *Bulnois' Rep.*, 382.

redeem. (y) The Judicial Committee of the Privy Council observed :—"The appellants (purchasers) say, that assuming this mortgage to have existed, and that there were some debts due at the time of the conveyance on the part of the testator, that then the widow would be enabled to convey an absolute estate. Their Lordships cannot subscribe to the proposition as so stated. They apprehend the law to be this : that Rani Dhun Kunwur, who may be considered as very much in the position of a Hindu widow, might have sold the estate absolutely, if it could have been shown (and the burden of showing this is upon the purchaser) that to convey such an absolute estate was necessary in order to pay the debts of the testator, and was for the benefit of his estate generally. In their Lordships' opinion there is no such proof whatever in this case. It appears that the testator possessed an income of about a lakh of rupees, *minus* the Government-revenue of Rs. 20,000, leaving him an income in round numbers of about £ 8,000 per annum. He is shown at the time of his death to have owed a certain debt of Rs. 9,000, which was subsequently increased to Rs. 22,000, and was paid off in another way ; therefore we have nothing to do with that. He is also shown to have owed a debt of Rs. 10,000 at the time of his death, that is £ 1,000. A man with an income of £ 8,000 a year is shown to have owed a sum of £ 1,000, and it is pretended that sixteen years afterwards a necessity arises for selling a considerable portion of his real estate to pay this debt of £ 1,000, *plus* some £ 400, which had been subsequently contracted by the Rani. The mere statement of these facts appears altogether to dispose of the contention that this estate could have been sold for the necessary purpose of paying the testator's debts, and when we add that both Courts have found that the fact was not so, their Lordships think it unnecessary further to dwell upon the point. The only question that remains, then, is whether the plaintiff is entitled to the decree of the High Court as it stands, or whether

(y) *Mouini Mahomed Shumsool Hooder v Sewakram alias Roy Durga Prasad*, 14 B. L. R., 226—27. L. R., 2 L. A., 7.

he is entitled to it without the burden of paying off the Rs. 14,000. On the whole their Lordships are of opinion that the judgment of the High Court was right; that, this mortgage of Rs. 14,000 subsisting upon the estate, credit should be given to the purchaser for the payment of the mortgage, which otherwise the plaintiff himself would have to meet." (2) In order to render the decree of the High Court more clear, their Lordships added thereto a declaration that the plaintiff was "to be put in possession of the said property after the decease of Mt. Rani Dhun Kunwar on payment to the said defendant of the sum of Rs. 14,000."

Where a sale of landed property was made by a Hindu widow and administratrix to the estate of her deceased husband, it was held (i) that she had power to dispose of the land for any purpose for which as administratrix she might properly do so; (ii) that an improper disposal of the property was not to be presumed against a purchaser from her, but that the sale must be taken to be proper and valid unless it appeared that to the purchaser's knowledge she was converting the estate for an unlawful purpose—"a purpose wholly foreign to her trust"; and (iii) that she having the right to sell as administratrix, it could not be presumed that she sold as widow, and also that it was not necessary to the validity of the assignment by her, that the instrument should describe the character in which she assigned. (a)

A wife Bhotatarini during the prolonged absence of her husband Kallv Prosonno who was erroneously supposed to be dead, acting in excess of the limited powers of a wife in possession of her absent husband's property, made a *maurasi* grant of a portion of her husband's estate to her paramour Bejoy Chunder. The grantee entered into and remained in possession for upwards of twelve years. It was held by the Calcutta High Court that the position of the grantee Bejoy Chunder was not that of a lessee, and that his possession—although in

(a) 14 B. L. R., at pp. 233—34; L. R., 2 I. A., pp. 16—17

(a) *Loganada Mudali v. Rāmavāmi*, 1 Mad. H. C. R., 384.

its inception an act of trespass against the husband—having continued for upwards of twelve years, had perfected his title to the lands, and that Kally Prosonno on his return was not entitled to eject the plaintiff Bejoy Chunder. It was further held that Bbobotarini could not acquire a title by adverse possession against her husband on the principle that one who holds possession on behalf of another does not by the mere denial of that other's title make his possession adverse, so as to give himself the benefit of the Statute of Limitation. (b)

An adopted son is not actually precluded from ever questioning acts done by his mother during his minority or before his adoption in the same manner as any other reversioner might question such acts. Yet a sale by a widow, with the consent of all legal heirs at the time existing, and ratified by decrees of Courts, is binding on reversioners as well as on an adopted son adopted long after the sale. (c)

A Muhammadan lady can sell or give away her property as she pleases. When a mother makes a gift to her children, and one of them seeks to set it aside as fraudulent, so far as it affects the plaintiff's right of inheritance, the plaintiff is not in a position to disturb it so long as the mother is alive, and admits the execution of the deed; and it is quite immaterial in such a case whether the plaintiff's consent was or was not given. (d)

When the rights of a Muhammadan widow who has been declared entitled to a fourth share of her husband's estate, but who has never taken possession, are sold, and a suit is pending by the nephew of the deceased husband to recover that share, on the ground that the vendee had been divorced,—held that all that the vendees were entitled to was to represent the vendor in the suit. (e)

(b) *Beejoy Chunder Banerjee v. Kally Prosonno Mukerjee*, 1 L. R., 4 Cal. p. 327

(c) *Rajkrishna Roy v. Kishore Mohon Mojomdar*, 3 W. R., 14.

(d) *Mahomed Zahoorool Huq v. Mt. Butoolun*, 1 W. R., 79.

(e) *Khajah Mahomed Gowhur Ali Khan v. Mussamut Shurufunnissa Begum*, W. R., 1864, 24,

Section 7 (B).—Of Sale of Stridhan. *

The Hindu law recognises the absolute dominion of a married woman over her separate and peculiar property, *except land given to her by her husband*; and of such *peculium* she is at liberty to make any disposition at pleasure (*f*)

Narada says :—"What has been given by the affectionate husband to his wife, she may, even while he is dead, consume or give it away according to her pleasure, excepting immovable property." From the adjective "given by the husband," it appears that immovable property other than that given by the husband may of course be given away." (*g*)

Yautuka or *Sowdaik stridhan* created by the husband descends not to his heirs, but to the heirs of the wife. (*h*)

The power of a Hindu female over her *stridhan* is absolute in her life-time, even when the fund has been derived from her husband and has been invested in immovable property. Their Lordships of the Privy Council, in an appeal from the Madras High Court, refused to interfere with the power of investment and application and disposition which the general law gave to a Hindu female over her *stridhan*. (*i*) Under the Hindu law a married woman is at liberty to make any disposition she likes of *money* constituting her *stridhan* or *peculium*; and if she purchases immovable property with or on the credit of such *stridhan* or out of the proceeds thereof, and without the aid of her husband's

* That alone is a woman's peculiar property, which she has power to give, sell or use, independently of her husband's control. *Dayabhāga*, Par. 18, Chap. 4, Sec. 1.

(*f*) Macnaghten's Principles of Hindu and Muhammadan Law, p. 44. See also *Gangadaraia v. Parameswara*, 5 Mad. H. C. Rep., 111; *Kotabasappa v. Chanverova*, 10 Bom. H. C. Rep., 403; *Rudr Narain v. Rup Kuar*, 1 L. R., 1 All., 734.

(*g*) Raghunandan's *Dayatattwa* (G. C. Sirkar's), p. 51.

(*h*) *Kashes O. Roy Chowdhry v. Gour Kishore Goocho*, 10 W. R., 139.

(*i*) *Rowvenkata Mahapati v. Mahipati Suriak*, (P. C.) 8 Calc. L. R., 304.

estate, she has a right to sell that immovable property. (j) Where the husband during his life-time did in every way, both publicly and privately whenever called upon to make a representation on the subject always represent that certain immovable property was his wife's, the purchasers from her could not after his death be equitably turned out of the property in favour of his heirs. The heirs after his death would be as much bound by the father's misrepresentations, as he would have been during his life. (k)

According to the Mitāksharâ and the Vivâda Chintâmani, all property that a woman inherits does not thereby become *stridhan*, so as after her death to descend to her heirs. Immovable property which in default of other intervening heirs has been inherited by a mother from her son descends on the mother's death, not to her heirs, but to the heirs of the son from whom she inherited it. (l)

According to the Mitāksharâ law, a Hindu widow may dispose of movable property inherited from her husband—a power she does not possess under the law of Bengal; but by both laws she is restricted from alienating any immovable property, whether ancestral or acquired, so inherited. On her death the immovable and the undisposed of movable property pass to the next heirs of her husband. The devolution of *stridhan* from a childless widow is regulated under the Mitāksharâ by the nature of her marriage; and if the marriage was according to the four approved forms, the *stridhan* goes to the collateral heirs of her husband in preference to her own next of kin. (m)

In those parts of the Presidency of Bombay where the doctrines of the Mayūkha prevail, a daughter who succeeds to an absolute and several estate in her father's immovable property

(j) *Rau v. Rau*, I. L. R., 1 Mal., 281; *Mohima O. Roy v. Durgamoney*, 23 W. R., P. C., 184.

(k) *Luchmun O. Geer Gossain v. Kali Ohurun Singh*, 19 W. R. (P. C.), 292. See ante p 79 (t) and (v).

(l) *Punchamund Ojha v. Lalshan Misser*, 3 W. R., 140. See also *Chotay Lal v. Ohunno Lal*, L. R., 6 I. A., 15; I. L. R., 4 Cal., 744; *Tevan v. Tevan*, L. R., 8 I. A., 99.

(m) *Mt. Thakoor Dayhee v. Rui Buluk Ram*, 11 M. L. A., 175; 10 W. R. P. C., 3. See also *Bhugwandas Dohay v. Myna Bacc*, 11 M. L. A., 487.

may, if she has no issue, dispose of such property during life, or may devise it by will ; and her alienee or devisee is entitled to hold it against her own heirs or the heirs of her father. (n)

Property given by a mother to her daughter *inter viros* or by will is *stridhan* ; but when a daughter inherits from her mother, what she takes is not *stridhan* according to Bengal law. (o) Under the Bengal school of Hindu law and the Bengal decisions on the *Mitāksharā*, inherited property is not *stridhan*. (p)

Property inherited by a paternal grandmother from her grandson is like property inherited by the mother from the son, subject to the same restrictions as to its disposal as that inherited by the wife from her husband. Such property, therefore, does not rank as *stridhan*, and devolves on her death on the heirs of her grandson. (q)

A testamentary bequest of immovable property to a Hindu widow, *with an express power of alienation*, has been held to be valid, and to authorize alienation by her. Where a husband is not incompetent to give such an interest in property to his wife, it cannot be contended that he is incompetent to bequeath it. (r)

Jewels given to a married woman during coverture by a relative or a stranger,—*Held* to be property belonging to the separate use of the wife. *Held*, further, that the subsequent investment of the same in the purchase of real estate conveyed to the wife, does not cause a change in the nature of such property. (s)

A deed conveying the interest of a native married woman
Conveyance by a married woman. in land will not be set aside on the ground of want of legal advice or misapprehension, where the husband is aware of the alienation, and it is not shown that there is a gross inadequacy of price. (t)

(n) *Haribhat v. Damodar Bhat*, I. L. R., 3 Bom., 171.

(o) *Prankissen Laha v. Sm. Noyanmoney Das*, I. L. R., 5 Cal., 222.

(p) *Juggomohun Haldar v. Sarodamoyee Das*, I. L. R. 3 Cal., 150.

(q) *Phukar Singh v. Ranjit Singh*, I. L. R., 1 All., 661.

(r) *Jeevan Panda v. Mt. Sona*, 1 N. W. P. H. C. Rep., 66. See *ante*, p. 279 (g).

(s) *Cohen v. Auction & Co.*, 1 Hyde's Rep., 130. See Married Women's Property Act (III of 1874) ; also sec. 4, Act X of 1865.

(t) *Manohur Dass v. Khoosun Begum and others*, Coryton's Rep., 121.

Section 8—Sale of Minor's Property.

The mother and guardian of a Hindu minor, though not a ^{Uncertificated} guardian appointed under Act XL of 1858, when acting *bonâ fide* and under the pressure of necessity, may sell his real estate to pay ancestral debts and to provide for the maintenance of the minor. (u) The rules laid down in Act XL of 1858 from sec. 18 downwards, apply only to certificated managers and to guardians appointed under the Act. This section applies in terms to a manager acting under a certificate, and to such manager only; it confers on him generally the powers of the owner, but in regard to acts of alienation beyond certain limits, it requires that his acts in order to be valid, should have the previous sanction of the Court; such provisions are altogether unsuitable to the case of a manager entirely unconnected with the Court. (v) Mr. Justice Jackson in delivering the judgment of the Full Bench in the case observed:—“In fact there is no indication whatever in Act XL of 1858 of any intention to alter or affect any provision of Hindu or Muhammadan law as to guardians who do not avail themselves of the Act. The scope of the enactment is merely to remove legislative prohibitions, to confer expressly a certain jurisdiction, and to define exactly the position of those who avail themselves of or are brought under the Act, leaving persons to whom any existing rules of law apply unaffected.” The effect of sec. 18, Act XL of 1858 is that a sale made by a certificated guardian without authority from the Court was invalid, even though the purchaser had acted honestly and paid a fair price. (w)

(u) *Soonder Narain v. Bonud Ram*, I. L. R., 4 Cal. 76. See also *Roshun Sing v. Har Kishen Sing*, I. L. R., 3 All., 635.

(v) *Ram Chunder Chuckerbutty v. Brijomath Mozoomdar*, I. L. R., 4 Cal. 929. (F. B.)

(w) *Sarat Chunder Chatterjee v. Asutosh Chatterjee*, 24 W. R., 46.

A mortgage of the property of a minor made by the administrator of a minor's property under the same Act, is invalid, unless the sanction of the Court has been previously obtained under s. 18 of the Act. Where such administrator was sued, as representing the minor, by the mortgagee, and made no defence to the suit, and the property was sold to a third person, who knew that the administrator had executed the mortgage in that capacity, it was held that the decree did not protect the mortgagee who purchased at the Court-sale, nor her vendee, from a suit by the minor for recovery of the property. (x) In this case the administrator was held to have improperly acquiesced in the decree made upon the mortgagee's suit and the Court found that both the mortgagee and the purchaser from him were both affected with notice of the administrator's improper conduct, and that the vendee from the mortgagee (who purchased the property at a Court-sale held in pursuance of his decree upon the mortgage) could not say that he was a *bonâ fide* purchaser for value without notice, for he certainly had notice that the certificated guardian's power of dealing with his ward's property was only such as guardian appointed under the Act could exercise, and that he was, therefore bound to enquire whether the mortgage had ever been sanctioned by the Court.

A sale of a minor's immovable property by a guardian appointed under Act XL of 1858, and who was also the kartâ of the joint family of which the minor was a member, is invalid if made without the sanction required by s. 18 of that Act, even though the sale may have been for the benefit of the minor and made in good faith to pay off the debts of the ancestor. Where, however, it was found that the purchaser had acted *bonâ fide*, and had paid a fair price for the property, he held entitled to a refund of so much of the purchase-money as

Invalidity of sale by certificated guardian without sanction of the Court. Refund of purchase-money.

(x) *Debi Dutt Sahoo v. Subodra Bybee*, I. L. R., 2 Cal., 283.

had been expended for the benefit of the minor. (y) The Court observed :—" However much we may desire to support a purchaser who has not acted dishonestly, and by whom a fair price has been paid, we think it impossible to declare a sale valid which is made by a guardian without the sanction which s. 18 requires. The words are very strong. It is not merely that they contain a direction that the sanction of the Court shall be obtained ; they say without an order of Court previously obtained the guardian shall absolutely not have the power to sell. It seems to us we are bound to treat the sale as made by one having no power in the matter, and therefore as bad. The purchaser who, knowing that he is dealing with a guardian, chooses to ignore the provisions of the Act, has no one but himself to blame if he suffers from the consequences of his negligence.

" As, however, the lower Court finds that the conduct of the purchaser was not dishonest, and that he paid a fair price, we shall declare that the plaintiff is entitled to be restored to possession with mesne profits on his repaying to the purchaser so much of the money paid by the purchaser as has been applied to the benefit of the minor's estate. The purchaser on being repaid so much as shall be found to have been applied for the benefit of the minor with interest at 6 per cent, on the money so paid, must give up possession to the plaintiff, accounting for the mesne profits for the time he has been in possession."

Act XL of 1858 does not prevent a guardian, who has obtained a certificate thereunder from selling or mortgaging property in Calcutta without the sanction of the Court. (z) " I do not think," said Mr. Justice Markby, " it is possible to apply this Act (XL of 1858) to property in Calcutta over which the Courts to which this Act applies have no jurisdiction. In this Court, which alone has jurisdiction over landed property in Calcutta, the relations between incapacitated persons and their guardians, whether testamentary or otherwise, have always been treated from a different point of view to that

(y) *Shurrut Chunder v. Raj Kissen Mookerjee*, 15 B. L. R., 350—56.

(z) *Gopal Nagraj Masoomdar v. Muddomuty Gupti*, 14 B. L. R., 22.

taken in the Mofussil. The notion that a testamentary guardian could not act on behalf of his ward without the sanction of the Court, as far as I am aware, has never prevailed in Calcutta. Nor has it ever been the practice in this Court to obtain that sanction. How the Act might be applied *in personam* with reference to property in Calcutta in a case arising in the Mofussil, I need not consider."

A Hindu family being heavily oppressed with debts, ancestral and otherwise, the two elder brothers of the family, for themselves and as guardians of their minor brother, under Act XL of 1858, applied to and obtained from the District Judge an order, under s. 18 of the Act, for the sale of several portions of the ancestral estate, and sold the same under registered deeds signed by the judge. Within twelve years after the registration, the adopted son of the minor brother brought several suits against the purchasers to set aside the sales and recover back his share of the property, alleging that the two elder brothers had made the sale fraudulently and illegally to satisfy personal debts of their own. *Held*, that a suit of this nature is not a suit "to set aside an order of a Civil Court" under art. 15, sched. ii of Act IX of 1871; nor is it a suit "to cancel or set aside an instrument not otherwise provided for" under art. 92, but that it is governed by art. 145.

Per Garth, C. J.—Previously to the passing of Act XL of 1858, where a suit was brought by a minor on coming of age, to recover property sold by his guardian during his minority, it was generally incumbent upon the purchaser to prove that he acted in good faith; that he made proper inquiries as to the necessity for the sale; and had honestly satisfied himself of the existence of that necessity. Now, under s. 18 of that Act, the Civil Court not only has the power, but is bound, to enquire into the circumstances of each case, and to determine whether, as a matter of law and prudence, it is right that any proposed sale or mortgage of the minor's property should take place; and if the Court, upon the materials and information brought

before it by the guardian, makes an order for sale, a purchaser under such an order is not bound to make the same inquiry which the Judge has made, and to determine for himself whether the Judge has done his duty properly and come to a right conclusion.

Where a plaintiff alleges fraud or illegality as a ground for setting aside a sale made under s. 18, the onus lies upon him to make out a *prima facie* case of fraud or illegality, and to show that the debt, which formed the consideration for the sale in such case, was one for which the minor was not responsible.

Per Prinsep, J.—A stranger purchasing from a guardian, acting under the authority granted under s. 18 of Act XL of 1858, will be entitled to every protection from the Courts, so long as it is not shown that he acted in a fraudulent or collusive manner, knowing that the debts, for the liquidation of which the purchase-money would be applied, were not debts lawfully binding on the minor. The burden of proof in such a case would lie heavily on the person seeking to set aside the alienation. But where the purchaser is himself the creditor, and therefore, has the means of satisfying a Court as to the origin and nature of the debts and how they are binding on the minor, the burden of proof is shifted on the purchaser, when the plaintiff has established a *prima facie* case.

A recital in a deed that it is necessary to contract a debt binding on a minor, or a member of a joint family, is some evidence that the fact recited was present to the minds of the parties to the transaction, and the absence of any such recital will make it more difficult for the party on whom the burden of proof lies, to establish the existence of a legal necessity. But such a recital is not evidence sufficient to establish the fact so recited. (a)

(a) *Sikher Chand v. Dulputty Singh*, I. L. R., 5 Cal., 363—64. See also as to recitals *Sunker Lall v. Juddoobuns Suhaye*, 9 W. R., 285; *Raj Lakh Debia v. Gokul Chunder Chowdhry*, 3 B. L. R., P. C., 57; *Lollita Dassia v. Bhatia Molla Bhattacharjee*, 10 W. R., 208, (ante pp. 117—18).

In this case (b) Sir Richard Garth in delivering his judgment cited with approval the following observations of Lord Redesdale in *Beaut v. Humil* (c) with regard to the rights and duties of a purchaser of a minor's estate under a decree of a Court of Equity. "I think it would be too much to say, that a purchaser, under a decree of this description, can be bound to look into all the circumstances and go through all the proceedings from the beginning to the end. On the contrary, as far as I can find the general impression the cases give is, that a purchaser has a right to presume, that the Court has taken the steps necessary to investigate the rights of the parties; and it has on that investigation properly decreed a sale. Then he is to see, that this is a decree binding the parties claiming the estate. He has no right to call upon the Court to protect him from a title not in issue in the cause; but if he gets a proper conveyance of the estate, so that no person whom the decree affects can invalidate his title, although the decree may be erroneous and therefore to be reversed, I think the title of the purchaser ought not to be invalidated. If we go beyond this, we shall introduce doubts on sales under the authority of the Court, which would be highly mischievous. (d)

"A case came before Lord Eldon, which was much debated upon a variety of points, and fully considered by him in all its parts, and where the irregularity in the proceedings was far beyond what occurs in the present case; yet he conceived that the title of the purchaser could not be impeached on these grounds, and that he had a right to be protected, for that the purchaser had a right to presume that the Court had done right. (e) Lord Eldon seems to have been clearly of opinion, that mere irregularity, such as was in that case, without making out a case of fraud and collusion of some sort or other in the purchaser, was not sufficient to affect the purchaser."

(b) *Sikher O'und v. Dulputty Singh*, I. L. R., 5 Cal., 363.

(c) 2 Sch. & Lefroy, 566.

(d) See ante (pp. 224—27) *Makundi Lal v. Kamsila*, I. L. R., 1 All., 570.

(e) *Lloyd v. Jones*, 9 Ves., 37.

Until a division of ancestral property is effected, no member of a Mitâksharâ family can convey to a stranger any interest in the property. (f) But the incapacity of joint owners confers powers of alienation in certain cases of necessity upon the managing owner. (g) In other words, as long as a Hindu family under the Mitâksharâ is living in the joint enjoyment of family property, such property can only be alienated by the joint consent of all the members, or in the event of such necessity as will in the eye of the law give the karta power to alien as agent of all, then by the karta alone. (h) All that the purchaser has to do in such cases of sales or mortgages of ancestral property, is to see that there is sufficient pressure upon the estate at the time to render the sale or transfer necessary. The fact of there being a decree, an attachment, and a proclamation for sale, is a sufficient pressure upon the estate to warrant the guardian to sell or mortgage a portion of the property. (i) It is, therefore, a settled rule of Hindu law resting upon the authority of the Mitâksharâ and repeated judicial decisions, that a managing co-parcener has not the capacity to alienate or charge the share of his minor co-parcener in immovable ancestral property, except for the purpose of providing for some family need or the performance of an indispensable religious duty, or except the alienation or charge be for the benefit of the joint estate ; and in every case to which the rule is applicable, the *onus* of shewing, either by direct or presumptive proof, a *prima facie* case in support of the existence of the condition necessary to give the legal capacity to make the disputed disposition, lies upon the party claiming to have acquired under it a title to the minor's share of the property. Upon the question what is the amount of proof which the law renders necessary to discharge that burthen of proof : *Held*, that where the dispute as to the validity of a sale

(f) *Rajah Ramnarian Singh v. Pertum Singh*, 20 W. R., 190

(g) *Gourernath v. The Collector of Monghyr*, 7 W. R., 6.

(h) *Bunsee Lal v. Shaikh Aoladh Ahsan*, 22 W. R., 552.

(i) *Per LOCH AND MITTAR J.J.*,—*Sheoray Koer v. Nukchedes Lall*, 14 W. R., 72 ; *Mohabber Koer v. Jobha Singh*, 16 W. R., 221.

or mortgage of family property is with the person to whom it was made, and the pecuniary consideration for it has not been advanced for the purpose of discharging an antecedent charge on the property or an old debt incurred by an ancestor, the case of the vendee or mortgagee, as regards the existence of a family need or sufficient beneficial purpose requiring the advance of the consideration money, must be established by positive proof. But that between a *bonâ fide* sale or mortgage for an advance made to pay off a pre-existing mortgage, claim, or an unsecured debt of an ancestor, and one not made for that purpose, there was this distinction to be observed, that the burthen of establishing by direct proof that such prior claim or debt was incurred for a proper family purpose is not cast upon the vendee or mortgagee. He is only required to show this presumptively. But to do so it is incumbent on him to give proof not only of the consideration for the sale or mortgage having been *bonâ fide* advanced in discharge of an antecedent debt, but also of an enquiry productive of results which warranted his reasonably believing that such debt was a family obligation, and the sale or mortgage a prudent arrangement for its discharge. (j)

According to the *Mitâksharâ*, a son cannot prevent alienation by his father of property which the latter has inherited collaterally. The restriction upon the father's power of alienation, applies only to the grandfather's property. (k) Nor can the alienation of immovable property by the father be contested by his son, who at the time of the alienation was neither born nor begotten. (l)

The conveyance of property while the owner is a minor is not necessarily inoperative : if the sale is effected by the guardian and acquiesced by the minor when he comes of age, it may be valid notwithstanding. Where a purchaser of minor's property has been in possession for upwards of 11 years and the

(j) *Sarvana Tevan v. Muttayi Ammal*, 6 Mad. H. C. Rep., 371. See also *Hunnoman Pd. Panday's case*, 6 M. L. A., 393; *Mt. Nowruiton Koer v. Goura Dutt Singh*, 8 W. R., 193.

(k) *Nund Oomarr Lall v. Rascoodeen Hossein*, 10 B. L. R., 183.

(l) *Jado Sing v. Mt. Ramee*, 5 N. W. P. H. C. Rep., 113.

purchase was a *bonâ fide* one and for good consideration and was acquiesced in by the minor upon attaining his majority, the Court was of opinion that the sale ought not lightly to be set aside. (m)

The plaintiff, on coming of age, sued to set aside a sale of his ancestral property which had been made by his guardian during minority. No legal necessity was proved, but it appeared that he had the benefit of the sale-proceeds. A decree was passed in his favour, but subject to the condition that he should first refund the full amount of the purchase-money received by him from the defendant. (n) "The plea of minority," said Mr. Justice Dwarka Nath Mitter, "cannot be used to injure third parties, but it can be used only to protect the minor."

Mere delay on the part of a ward, after attainment of majority, in repudiating an alienation made by his guardian, cannot be treated as a ratification of the guardian's act, but only as evidence of ratification. (o)

Long delay, however, in repudiating a contract by a minor on his attaining majority, when such delay is wholly unaccounted for, is sufficient ground for inferring a ratification of the contract. (p)

Two of the widows of a deceased Muhammadan sold a portion of his real estate to satisfy decrees obtained by creditors of the deceased against them as his representatives. The sale-deed was executed by them on behalf of the plaintiff, a daughter of the deceased, she being a minor, in the assumed character of her guardians. *Held*, if the plaintiff was in possession, and was not a party to, or properly represented in, the suits in which the creditors obtained decrees, she could not be bound by the decrees nor by the sale subsequently effected, and she was entitled to recover her share, but

(m) *Kumrooddeen Shaikh v. Shaikh Bhadoo*, 11 W. R., 134.

(n) *Param Chunder Pal v. Karunanoy Das*, 7 B. L. R., 90.

(o) *Rajnarain Deb Chowdhry v. Kasi Chunder Chowdhry*, 10 B. L. R., 324. S. C., 18 W. R., 404.

(p) *Bulbulsingh Dey v. Ramkishore Dey*, 10 B. L. R., 326 note; *Durga Churn Saha v. Ramnarain Dass*, 10 B. L. R., 327 note.

subject to the payment by her of her share of the debts for the satisfaction of which the sale was effected. (q)

Where land was sold by the widow of an Armenian, who was also his executrix, for a valuable consideration, by bill of sale executed by an Armenian infant-heir to the testator—jointly with his mother, who in fact received the purchase-money. It was held that the conveyance was voidable, at least by the infant, and that the infant's entry and claim did entirely avoid it, the infant having derived no benefit, but the reverse, from such disposition of the land. (r)

Under the Muhammadan law, a sale by a guardian of property belonging to a minor is not permitted otherwise than in case of urgent necessity, or clear advantage to the infant. A purchaser from such guardian cannot defend his title on the ground of the *bona fides* of the transaction. An elder brother is not in the position of a guardian having any power as such over the property of his minor sisters. (s)

The plaintiff sued to recover her husband's share in certain property at Surat to which he and other persons became entitled as heirs of M. That property had been sold to the defendants by the heirs of M during the minority of the plaintiff's husband, his elder brother acting for him in the transaction. It was proved that the sale of the property to the defendants had been approved of by H, who was the Agent of the Governor of Bombay at Surat, and the representative of the ruling authority in the management of M's estate. The plaintiff contended that, according to the Muhammadan law, it was not competent for the elder brother of a minor, as guardian, to alienate a minor's property. It was held that the sanction of the ruling power constituted a sufficient authority for the act of the guardian, provided that the transaction was one which, according to the

(q) *Hamir Singh v. Musammat Takia*, I. L. B., 1 All, 57 F. B.

(r) *Doe dem Aratoon Gaspar v. Paddo Lochun Dass*, 9th Nov 1815—*East's notes*. Case 19—*MORLEY'S DIGEST*, Vol. II, p 30.

(s) *Bukshan v. Maldar Kooeri*, 3 B. L. R. A. C., 423.

Muhammadan law, a duly constituted guardian might have entered into on behalf of his ward. That law permits a guardian to sell the immovable property of his ward, (i) when the late incumbent died in debt, or (ii) when the sale of such property is necessary for the maintenance of the minor. The evidence in the present case showed that the indebtedness of M, and the distressed condition of his heirs existed in a sufficient degree to justify the sale of the whole property of the heirs. (f)

The question of legal necessity does not necessarily arise in cases of sale under the Muhammadan law, though it may properly be an element for consideration when the conduct of the guardian is called in question. The Muhammadan law looks to the benefit of the infant, and permits the guardian to dispose of movable property if it be for the benefit of the minor. In *Mt. Syedan v. Syud Velayat Ali Khan* (u) a sale made to carry on important litigation was held *bonâ fide* and for the benefit of the minor, the decision in *Grose v. Amertomoyee Dossee* (v) not being applicable.

M, a Muhammadan, inherited certain property from his father, which while he was a minor, his mother sold to the defendant in good faith, for the discharge of a debt adjudged to be due to the defendant by M's father. M when he became of age, sold the same property to the plaintiff, who sued to obtain possession thereof by avoidance of the sale to the defendant. It was held by the Allahabad High Court (i) that the plaintiff having no better title or other right than M could assert, was not competent to maintain the suit, without tendering payment of the debt ; and (ii) that, even if the Muhammadan law were applied, and M's mother was not legally competent to sell his property in the assumed character of his guardian, the plaintiff was bound to pay the debt due from M's father to the defendant before he could claim, by avoidance of the sale in question, the possession of the property in suit. (w)

(f) *Hussain Begam v. Zea-ul-nissa Begam*, I. L. R., 6 Bom., 467.

(u) 17 W. R., 230.

(v) 12 W. R., O. C., 13 ; 14 B. L. R., O. C., 1.

(w) *Sahu Ram v. Mohamed Abdul Rahman*, 6 N. W. P. H. C. Rev. 268.

A suit by the guardian of minors to set aside an alleged alienation made by the adult member of a joint Hindu family in collusion with the purchaser, and without the consent of his wards, is not premature.

According to the *Mithila* law, such a sale is void for want of the consent of the whole of the heirs and in the absence of proof that the sale was made for a legal necessity or for the benefit of the minors. (x)

A sale by guardian of a minor's property was upheld, where there was proof of pressing valid necessity, and no proof either of under advantage taken of the guardian by the purchaser, or of the existence of fiduciary relation between the guardian and the creditors, or of the inadequacy of the price at the time when the property was sold. (y)

The mere non-recital in a deed of a sale by a mother during her son's minority of the legal necessity for the sale does not vitiate the deed. The legal necessity may be proved *aliunde* by other evidence (z) such legal necessity must be presumed, and the acts of the guardian considered to be the acts of the minor in cases where neither want of enquiry nor *mala fides* is proved against the vendee. (a)

Where a deed of sale was executed by a *de facto* guardian of certain minors, and the consideration-money was duly applied for the benefit of the property, and the transaction was found to be a necessary one and beneficial to the minors, the mere fact that the manager was not *de jure* guardian, is not sufficient to invalidate the transaction. (b)

In 1845 some land was sold which was owned at the time by a Hindu joint family consisting of five brothers, three of whom were minors. The deed of sale purported to be executed by all the brothers, although three of them were by reason of infancy incapacitated from being parties to it.

Suit for damages by fraudulent purchasers against fraudulent vendors of minor's property. Rule as to costs.

(x) *Seo Pershad Jha v. Gunga Ram Jha*, 5 W. R., 221.

(y) *Kamala Prasad Narayan Singh v. Nohk Lall Sakoo*, 6 W. R., 30.

(z) *Woomesh Chunder Srikar v. Degumbari Dasi*, 3 W. R., 154.

(a) *Soodul Prasad Singh v. Gour Bagal Singh*, 1 W. R., 283.

(b) *Gunga Prasad v. Phool Singh*, 10 B. L. R., 368 note.

Contemporaneously with this deed of sale, an *ikrârnâma* was executed by the two elder brothers, which stated that they had executed the deed of sale on behalf of all the five brothers, the non-execution by the three younger brothers being attributed to their absence from the city and want of leisure—false excuses to screen their incompetency from non-age. The sale was not registered, but a fictitious suit was instituted by the purchasers against all five brothers and a fictitious confession in that suit was given in the names of all five. As soon as the younger brothers came of age, they instituted a suit against the purchasers for their share of the property sold and they succeeded in that suit. The purchasers thereupon instituted this suit to recover damages from their vendors—the two elder brothers. The Courts in India found that there was collusion between the vendors and purchasers. Judicial Committee of the Privy Council held that it is not for the public benefit that, where two parties knowingly deal with the sale or purchase of property of infants who have not by the law the power of sale, one of the parties (the purchasers) who obtain possession of the property in a manner calculated to injure the infants should be able to sue the other party (the vendors) for damages. Their Lordships further refused to give costs to either party considering them both *in pari delicto*. (c)

A sale by a father, as *guardian*, of property devolving on his sons from their maternal grandfather, can only be justified by proof of necessity for the son's benefit.

So also there must be clear proof of necessity in a sale by a mother, as *guardian*, of property belonging to her minor sons. (d)

When a person, after attaining majority, questions any sale of property made by his guardian during his minority the burden lies on the person who upholds the purchase, not only to show that, under the circumstances of the case, either the guardian had the power to sell, or that the purchaser reasonably supposed that he had such power,

Purchase from
guardian.

(c) *Shankarji Theroji v. Raghunath Gobind Roy*, 18 W. B., 230.
(d) 1 May, 25; See also 6 W. B., 30; 1 W. B., A. C., 247.

but further, that the whole transaction as regards the purchaser's part in it was *bonâ fide*. When either the person who sells labours under a disqualification, or the purchaser stands in a fiduciary relation to the owner of the property, the *bona fides* of the dealing cannot be presumed, but must be made out by the purchaser. (e)

Although purchasers are not bound to look to the application of the purchase-money, or to enquire whether there were goods and chattels and house furniture sufficient to redeem the mortgaged property, and so obviate the necessity of a sale of a minor's property, yet the purchaser's not proving necessity or not satisfying himself of the existence of a sufficient pressure or necessity, and the unwillingness of the minor's mother to dispose of the property in his minority, are sufficient legal grounds for reversal of the sale. (f)

Inadequacy of consideration which on the face of it bears the marks of fraud, or when the inadequacy is so considerable as to occasion serious injury and detriment to the interest of the minor, or when it is the result of culpable negligence on the part of the guardian, will avoid any transaction entered into by him on behalf of the ward and make him liable for the consequences.

If the transaction has been entered into *bonâ fide* with due care and attention, the guardian would not be held responsible for any untoward consequences which may have resulted from it, contrary to his expectation and forecast.

More silence for a period short of that prescribed by the law of limitation cannot by itself constitute a valid ground for rejecting a person's claim to set aside an alienation improperly made by his guardian, during his minority, without valid necessity.

A person who has arrived at majority is not required by law to give any notice, express or implied, to the person who holds his property under such an alienation, or to perform any

(e) *Roop Narain Singh v. Gungadhar Prasad Narain*, 9 W. R., 297.

(f) *Gomdin Sirkar v. Prannath Gupta*, 1 W. R., 14

preliminary acts before he can bring a suit to set it aside. In laying down these positions of law in a case upon special appeal Justice Dwarka Nath Mitter said :—" We do not mean to say that long silence on the part of a person arrived at majority to impugn the validity of a transaction between his lawful guardian during his minority and a third party, cannot be treated as evidence of ratification, merely because that silence falls short of the period prescribed by the statute of limitation. Nor do we mean to say that a Court of Justice whose duty it is to determine a question of fact cannot, in any case, infer a ratification from the fact of such silence. But after a careful consideration of all the arguments and authorities brought to our notice, the conclusion we have arrived at is that mere silence for a period short of that prescribed by the law of limitation, cannot by itself constitute a valid ground for rejecting a person's claim to set aside an alienation improperly made by his guardian without any valid necessity. Such a course would be tantamount to the establishment of a new rule of limitation not sanctioned by the statute, and it is therefore clear that mere delay in repudiating an alienation, like that above described, can be treated only as evidence of ratification, if such ratification is pleaded, and in no other light.

"In this case it was admitted that there is no *direct* evidence of any positive act of ratification. There may be case in which mere silence for an undue length of time may be taken as proof of such an act. But in this case it is clear, upon the learned Judge's own showing, that there was something more than silence, namely, the express repudiation of the defendant's title in the *kobalah*, executed in favour of the plaintiff by his vendor immediately after the latter's arrival at majority. That *kobalah* is at any rate evidence of the declared intention of the plaintiff's vendor to institute proceedings against the defendant, at least, of an intention existing on the date of its execution, and there is, therefore, direct evidence not of ratification but of positive disaffirmance or repudiation. It is not even alleged that there has been any ratification since that date, the acts of

his vendor done subsequently to the date of his purchase being of course rejected as not binding against him, the plaintiff." (g)

Whatever may have been the effect of s. 11 of Act XIV of 1859, as to extending the privilege given to a minor to his representative, s. 7, the corresponding section of Act IX of 1871, limits the privileges to the minor himself and his representative after his death; and therefore a purchaser from a minor cannot claim the benefit of that section. (h)

In the case of a sale by a person, young indeed and in distressed circumstances, but not without advice or means of information, of an estate actually vested in him, but not to be obtained without litigation, the party seeking to set aside the sale must establish the fraud, actual or constructive, which entitles him to relief. It is not sufficient for him to show that he did not receive the full value of the estate to which the result of the litigation might ultimately show him to be entitled. The difference between that value and purchase-money, if not too disproportionate, may be legitimately taken to represent the difference between certainty and immediate enjoyment on the one hand, and risk, worry, expence and delay on the other. The exceptional equitable principles, which in a sale by an expectant heir of a reversionary interest, throw upon the purchaser the onus of showing that he gave a fair price, and which, on failure of such proof, entitles the expectant heir to have the sale set aside, have no application in such a case, or in that of every ignorant and improvident person. (i)

(g) *Rajnarain Deb Chowdhry v. Kashee Chunder Chowdhry*, 18 W. R., 404—6. S. C., 10 B. L. R., 329—31.

(h) *Mahomed Arsad Chowdhry v. Yakooob Ally*, 15 B. L. R., 357.

(i) *Mir Azimuddin Khan v. Zia-ul-Nissa*, I. L. R., 6 Bom., 309—10.

Section 9.—Sale of Lunatic's Property.

Act XXXV of 1858 was passed to make better provision for the care of the estates of lunatics not subject to the jurisdiction of the Supreme Courts of Judicature in India. Since the passing of this Act limiting the powers of a manager of a lunatic's estate, no manager *de facto* or *de jure*, can have power to do that which the Act forbids. (j) Section 14 of this Statute enacts that every manager of the estate of a lunatic appointed thereunder may exercise the same powers in the management of the estate as might have been exercised by the proprietor, if not a lunatic : and may collect and pay all just claims, debts, and liabilities due to, or by the estate of the lunatics. But no such manager shall have power to sell or mortgage the estate or any part thereof, or to grant a lease of any immovable property for any period exceeding *five* years, without an order of the Civil Court previously obtained. (k)

A Hindu, being a lunatic, may be possessed of property, although he cannot take it by inheritance. All dealings with such property to be binding must be effected by a guardian or manager duly appointed by the Supreme Civil authority ; and since the passing of Act XXXV of 1858, a guardian or manager can only be appointed in the special manner prescribed by that Act. A *de facto* manager can have no greater powers than one duly appointed. Where, therefore, the mother of a lunatic who had not been so appointed, mortgaged his estate without the previous sanction of the Court, the mortgagee's suit for foreclosure was dismissed. (l)

(j) *Per PHEAR J., The Court of Wards v. Kupulman Singh*, 10 B. L. B., 364.

(k) Sec. 14, Act XXXV of 1858. Cf. sec. 18, Act XL of 1858 ; sec. 13, Act XXXIV of 1858.

(l) *The Court of Wards v. Kupulman Sing*, 10 B. L. B., 364.

Act XXXIV of 1858* regulates proceedings in Lunacy in the Courts of Judicature established by Royal Charters within the British Territories in India.

A person who is usually of unsound mind, but occasionally of sound mind, may make a contract when he is of sound mind. (m) A patient in a lunatic assylum, who is at intervals of sound mind, may contract during those intervals. (n) The conveyance of an *idiot* or *insane person* (except during a lucid interval) is, therefore *voidable*, if not absolutely "null and void *ab initio*." It may be avoided during his life-time by the party legally authorized to act for him; or, after his death, by his heir, or, any other person interested. (o)

* SECTIONS 13 & 18—23 OF ACT XXXIV OF 1858

XIII. It shall be lawful for the Court, on the appointment of Committee of the person and estate of a Lunatic, to direct by the order of appointment, or by any subsequent order, that the person to whom the charge of the estate is committed shall have such powers for the management thereof as to the Court shall seem necessary and proper, reference being had to the nature of the property, whether movable or immovable, of which the estate may consist. But such powers shall not extend to the sale or charge by way of mortgage of the estate or any part thereof, or to the letting of any immovable property, unless for a term not exceeding *three* years.

XVIII. The Court may, if it appears to be just or for the Lunatic's benefit, order that any property movable or immovable, of the Lunatic, and whether in possession, reversion, remainder, contingency, or expectancy, be sold or charged by way of mortgage or otherwise disposed of, as may seem most expedient for the purpose of raising money to be applied for any of the following purposes:—

1. The payment of the Lunatic's debts, including any debt incurred for his maintenance or otherwise for his benefit.

2. The discharge of any incumbrance on his estate.

3. The payment of or provision for the expenses of his future maintenance and the maintenance of his family, including the expenses incidental thereto.

4. The payment of the costs of any enquiry under this Act, and of any costs incurred by order or under the authority of the Court.

XIX. The Committee of the Lunatic's estate shall, in the name and on behalf of the Lunatic execute all such conveyances and instruments of transfer relative to any sale, mortgage, or disposition of his estate as the Court shall order. In like manner such Committee

(m) The Indian Contract Act, (Act IX of 1872), sec 12.

(n) *Ibid*, Illustration (a).

(o) Stephen's Commentaries, 6th Ed., Vol I., p. 490.

The Indian Trustee Act, 1866, which applies to "cases to which English law is applicable," provides that the High Court may convey contingent rights. when any lunatic or person of unsound mind shall be entitled to any contingent right in any immovable property upon any trust or by way of mortgage, it shall be lawful for the High Court to make an order wholly releasing such property from such contingent right, or disposing of the same to such person or persons as the said High Court shall direct, and the order shall have the same effect as if the trustee or mortgagee had been sane, and had duly executed a deed so releasing or disposing of the contingent right. (p)

A Court of Equity will not set aside the voluntary deed of a weak man who is not absolutely *non compos*, unless the weak-

shall, under the order of the Court, exercise all powers whatsoever vested in a Lunatic, whether the same are vested in him for his own benefit or in the character of trustee or guardian.

XX. Where a person, having contracted to sell or otherwise dispose of his estate or any part thereof, afterwards becomes Lunatic, the Court may, if the contract is such as the Court thinks ought to be performed, direct the Committee of the estate to execute such conveyances and to do such other acts in fulfilment of the contract as it shall think proper.

XXI. If a member of a partnership firm be found Lunatic, the Court may, on the application of the other partners, or of any person who appears to the Court to be entitled to require the same, dissolve the partnership; and thereupon, or upon a dissolution by decree of Court or otherwise by due course of law, the Committee of the estate may, in the name and on behalf of the Lunatic, join with the other partners in disposing of the partnership property, upon such terms, and shall do all such acts for carrying into effect the dissolution of the partnership, as the Court shall think proper.

XXII. Where a Lunatic has been engaged in business, the Court may, if it appear to be for the Lunatic's benefit that the business premises should be disposed of, order the Committee of the estate to sell and dispose of the same; and the monies arising from such sale shall be applied in such manner as the Court shall direct.

XXIII. Where a Lunatic is entitled to a lease or under-lease, and it appears to be for the benefit of his estate that it should be disposed of, the Committee of the estate may, by order of the Court, surrender, assign, or otherwise dispose of the same to such person for such valuable or nominal consideration, and upon such terms as the Court shall think fit.

(p) Act XXVII of 1866, sec. 5. Cf. 13 & 14 Vic. c. 60, s. 4.

ness, as well as the facts surrounding the transaction itself, be such as to satisfy the Court that the person had not at the time a mind adequate to the business, and that he might be imposed upon, or the Court is not satisfied as to the entire good faith of all parties to the transaction. (q) It has been held that the Court will not measure the degrees of understanding. "Imbecility of mind," says Mr. Kent in his Commentaries, "is not sufficient to set aside a contract when there is not an essential privation of the reasoning faculties, or an *incapacity of understanding and acting with discretion in the ordinary affairs of life*. This incapacity is now the test of that unsoundness of mind which will avoid a deed. The law cannot undertake to measure the validity of contracts by the greater or less strength of the understanding; and if the party be *compos mentis*, the mere weakness of his mental powers does not incapacitate him. Nor is a person born deaf and dumb to be deemed absolutely *non compos mentis*, though every such person was *prima facie* incompetent, inasmuch as the want of hearing and speech must exceedingly cramp the powers and limit the range of human mind. Weakness of understanding may, however, be a material circumstance in establishing an inference of unfair practice or imposition; and it will naturally awaken the attention of a Court of Justice to every unfavourable appearance in the case." (r)

A contracts to sell land to B. Before the completion of the contract, A becomes a lunatic and C is appointed his Committee. B may specifically enforce the contract. (s)

(q) *Rajender Chunder Newjee v. Bhoobun Kalee Debea*, W. R., 1864, 65.

(r) Kent's Commentaries, Vol. II, p. 609. See also *Bridgman v. Green*, Wilmot., 58, 61.

(s) The Specific Relief Act I of 1877, sec 27 *Illustration* to cl. (b)

Section 10.—Of Sales of Insolvent's Property.

When property has been attached by a judgment-creditor in execution of a decree, and a vesting order is made subsequent to such attachment, the property passes to the Official Assignee subject to being divested by a sale in execution of the decree, and the purchasers at the sale in execution of the decree acquires a good title to the property. (t)

Where, however, the attachment is before judgment, the attaching creditor has no priority over the Official Assignee. (u)

Subject to the right and claim of the Official Assignee, and so long as he does not interfere, an insolvent, who has not obtained his final discharge, has power with respect to after-acquired property to buy and sell and give discharges, and to do all other acts which he could have done before his insolvency. The possession of such property by an insolvent in such a position may be adverse to the Official Assignee so as to bar the title of the latter by lapse of time. Where, therefore, an insolvent, upon the death of his father became entitled to and seized of certain joint family property as one of three sons and on partition continued in undisturbed possession for more than 12 years the Official Assignee making no claim, such possession was held to be adverse possession against the Official Assignee; and a suit against a *bonâ fide* purchaser for full value from the insolvent brought by a subsequent purchaser from the Official Assignee was dismissed with costs. (v)

A joint family property acquired and maintained by profits of trade is subject to all the liabilities of that trade (w) Where,

(t) *Anand Ohandra Pal v. Panchi Lal Surma*, 5 B. L. R., 691; 14 W. R., F. B., 33. *Gumble v. Bolagir*, 2 Bom. H. C. Rep., 146.

(u) *Pitambar Mundle v. Cochrane*, 1 Ind. Jur., 11; *Java Ramji v. Jadedoji Natha*, 1 Bom. H. C. Rep., 224. [556—9.]

(v) *Kristo Komal Mitter v. Suresh Ohunder Deb*, I. L. R., 8 Cal., 51.

(w) *Ramdas Thakurdas v. Lakmichand*, 1 Bom. H. C. R., p. 51. See also *Oswar v. Nundy*, I. L. R., 3 Cal., 738; *Dosses v. Dosses*, I. L. R., 5 Cal., 792.

therefore, a house belonging to an insolvent, the surviving male member of a Mitāksharā family, was put up for sale and conveyed by the Official Assignee, subject to the right (if any) to maintenance and residence of the plaintiff, who was a widow of a deceased nephew of the insolvent, it was held that the effect of such conveyance was, that the purchaser took only such estate as the Official Assignee could give, but inasmuch as the plaintiff in this case had no right as against the joint creditors to maintenance or residence out of or in the house in question, the purchaser took an absolute estate. (x)

A mortgage executed by an insolvent (who has not obtained a certificate and discharge) is subject to the lien of the mortgagee in priority to the claim of the Official Assignee under the insolvency (y) "Under the Statute, 11 and 12 Vic. c. 21, the Assignee has a right to the subsequently acquired property of the insolvent, unless the insolvent has obtained a certificate and discharge; but the Assignee's right to the subsequently acquired property is subject to *two* qualifications. In the *first* place, if the insolvent has acquired property, subject to debts and obligations, then any property taken by the Assignee under that state of things is taken subject to those charges and equities which affect the property in the hands of the insolvent. The *second* qualification is this, that if the insolvent carries on trade at a subsequent period, with the assent of the Assignee of the estate under the Insolvent Act, in the first instance the property which is acquired in the subsequent trade, will be subject in equity to the charge of the creditors in that trade, in priority to the claim of the Assignee under the first insolvency." A purchaser from the Official Assignee, therefore, takes subject to all equities attaching to the property in the hands of the insolvent.

A prior mortgage established—as made *bonâ fide* against a purchaser of the insolvent's rights from the Official Assignee. (z)

(x) *Johurra Bibee v. Sree Gopal Misser*, 1 L. R., 1 Cal. at p. 475.

(y) *Moses Kerakoose v. Benjamin Brooks*, 4 W. R., P. C., 62.

(z) *Nadiroonissa Bibee v. Tara Chand Banerjee*, 1 W. R., 137.

Section 11.—Of Sales by Fiduciary Vendors.

(A)—SALES BY TRUSTEES.

Trust-estates are recognised by the Courts in British India, though the distinction between legal and equitable estates does not obtain on account of there being no separate Courts of Law and Equity as in England. "The anomalous law," said Mr. Justice Willes in *Tagore v. Tagore*, "which has grown up in England of a *legal* estate paramount in one set of Courts, and an *equitable* ownership paramount in Courts of Equity, does not exist in, and ought not to be introduced into, Hindu law. But it is obvious that property, whether movable or immovable, must, for many purposes, be vested, more or less absolutely, in some person or persons for the benefit of other persons, and trusts of various kinds have been recognised and acted on in India in many cases. Implied trusts were recognised and established here in the case of a *benāmi* purchase in *Gopee Kristo Gossain v. Gunga Prasad Gossain (a)*; and in cases of a provision for charity or for other beneficent objects, where no estate is conferred upon the beneficiaries, and their interest is in the proceeds of the property, the creation of a trust is practically necessary. But a man cannot be allowed to do by indirect means what is forbidden to be done directly; and a settlor or testator cannot, under the guise of an unnecessary trust of inheritance, indirectly create beneficiary estates of a character unauthorized by law, and which could not be directly given without the intervention of the trust, and such trusts can be sustained to the extent and for the purpose of giving effect to those beneficiary interests which the law recognizes, and after the determination of those interests, the beneficial interest in the residue of the property

(a) 6 M. L. A., 53.

remains in the person who, but for the will, would lawfully be entitled thereto." (b)

The purposes for which estates are vested in trustees for sale, are generally either for the benefit (1) of creditors; (2) of individuals *sui juris*; (3) or persons not *sui juris*, eg. infants.

A trustee-for-sale is bound to sell the trust property to the best advantage with a fair and impartial attention to the interest of all parties concerned. He should ascertain the value of the trust-property beforehand, and use all reasonable diligence to obtain a proper price; and "if he is negligent in conducting the sale, as by not advertising, he will be personally liable for any loss occasioned. All the trustees are equally liable, and cannot escape responsibility, on the ground that the conduct of the sale was delegated to one of their number. If, however, a trustee enters into a contract for the sale of trust-property, he is not bound to break off the contract in order to sell to another person who makes a higher offer; and when there are two offers, and it is not quite clear which is the most advantageous, the trustee will not be liable for refusing to accept the offer preferred by the *cestui que trust*." (c) If trustees or those who act by their authority, fail in reasonable diligence in inviting competition or in the management of the sale, as if they contract under circumstances of haste and improvidence, or if they contrive to advance the interest of one beneficiary at the expence of another, they will be personally responsible for the loss to the suffering party; and the Court, however correct the conduct of the purchaser, will refuse at his instance to compel the specific performance of the agreement. (d)

A contract made by trustees either in excess of their powers or in breach of their trust cannot be specifically enforced. (e) A is a trustee of land with powers to lease it for seven years. He enters into a contract with B to grant a lease of the land for

(b) *Tagore v. Tagore*, 9 B. L. R. (P. C.), at pp. 401—402.

(c) *Agnew's Law of Trusts in British India*, pp. 168—69.

(d) *Lewin's Law of Trusts*, 5th Ed., p. 313.

(e) *The Specific Relief Act* (I of 1877), sec. 21 (e).

seven years, with a covenant to renew the lease at the expiry of the term. The contract cannot be specifically enforced. (f)

It is the duty of trustees who, having a trust or power to sell the trust-property, join with the owner of another property in selling both properties together, *first*, to see that such a mode of sale is beneficial to their *cestui que trust*; *secondly*, to see that their share of the purchase-money is apportioned before the completion of the purchase, and to obtain payment of such apportioned share; and *thirdly*, to apportion the share themselves, taking care to act under proper advice. The proper mode of apportioning the prices of a life-estate and reversion when sold together for a lump sum, is to value both interests separately, and *not* to put a value on one and deduct that from the total price. (g)

The sale of property at a grossly inadequate value is a breach of trust which affects the title in the hands of the purchaser. (h) Two trustees A and B empowered to sell trust-property worth a lakh of Rupees, contract to sell it to C for Rs. 30,000. The contract is so disadvantageous as to be a breach of trust. C cannot enforce specific performance. (i)

A trustee having a discretionary trust for sale of real estate under a will at such price as he should think reasonable, with power to postpone the sale, leased the property for thirty years with the concurrence of the beneficiaries. Before the lease expired the property was put up for sale by the lessee and the trustee conjointly, the facts being disclosed by the particulars of sale, and a sale having been effected, the purchase-money was apportioned between the two interests according to the valuation of a skilled valuer: *Held*, that the purchaser was not entitled to insist on the concurrence of the beneficiaries on account of the valuation not having been made before the sale, and that the title would be forced upon him. (j)

(f) The Specific Relief Act (I of 1877), sec. 22, *Illustration* to cl. (e).

(g) *In re Cooper & Alban's sale to Hartech*, L. R., 4 Ch. D., 802.

(h) *Agnew's Law of Trusts in British India*, p. 169; *Lawin*, p. 314.

(i) The Specific Relief Act I of 1877 sec. 21 *Illustration* to (e).

(j) *Morris v. Esherham*, L. R., 2 Ch. D., 540.

The Trustees' and Mortgagees' Powers Act (XXVIII of 1866) applies to "cases to which English law is applicable." The main provisions of this enactment as to sales by trustees and mortgagees are given below for facility of reference; and sections six to nineteen both inclusive) of the statute applies only to English mortgages, wherever in British India the mortgaged property may be situate, when neither the mortgagor nor the mortgagee is a Hindu, Muhammadan or Buddhist. (k)

SECTIONS 2, 3, 4, 6, 7, 8 & 17 OF ACT XXVIII OF 1866.

II. In all cases where, by any will, deed, or other instrument of settlement, it is expressly declared that trustees or other persons therein named or indicated shall have a power of sale (a), either generally or in any particular event, over any immovable property named or referred to in, or from time to time subject to, the uses to trusts of such will, deed, or other instrument, it shall be lawful for such trustees or other persons, whether such property be vested in them or not, to exercise such power of sale by selling such property either together or in lots, and either by public auction or private contract, and either at one time or at several times.

III. It shall be lawful for the persons making any such sale to insert any such special or other stipulations, either as to title or evidence of title, or otherwise, in any conditions of sale, or contract for sale, as they shall think fit; and also to buy in the property or any part thereof at any sale by auction, and to rescind or vary any contract for sale, and to re-sell the property which shall be so bought in, or as to which the contract shall be so rescinded, without being responsible for any loss which may be occasioned thereby; and no purchaser under any such sale shall be bound to enquire whether the persons making the same may or may not have in contemplation any particular re-investment of the purchase-money in the purchase of any other property or otherwise.

IV. For the purpose of completing any such sale as aforesaid, the persons empowered to sell as aforesaid shall have full power to convey or otherwise dispose of the property in question in such manner as may be necessary.

VI. Where any principal money is secured or charged by deed on any immovable property, or on any interest therein, the person to whom such money shall for the time being be payable, his executors, administrators, and assigns, shall, at any time after the expiration of one year from the time when such principal money shall have become payable, according to the terms of the deed, or after any interest on such principal money shall have been in arrear for six months, or after any omission to pay any premium or any insurance

(k) The Transfer of Property Act (IV of 1882), sec. 69

A discretionary trust for sale cannot be exercised by a minor or by a person of unsound mind, for neither of them can enter into a valid contract. (1) "It is not in the power of the author of a trust," said Wood, V. C. in the case of a devise in trust to an infant, "to confer upon an infant a capacity in himself which the law does not give him, although he may make the infant his hand, his *agent*, to execute his purpose. He cannot give an estate to an infant, and say that he may sell it when the law says he cannot do so."

which by the terms of the deed ought to be paid by the person entitled to the property subject to the charge, have the following powers to the same extent (but no more) as if they had been in terms conferred by the person creating the charge, namely:—

1st.—A power to sell or concur with any other person in selling the whole or any part of the property by public auction or private contract, subject to any reasonable conditions he may think fit to make, and to rescind or vary contracts for sale, or buy in and re-sell the property from time to time in like manner.

2nd.—A power to appoint, or obtain the appointment of, a receiver of the rents and profits of the whole or any part of the property in manner hereinafter mentioned.

VII. Receipts for purchase-money given by the person or persons exercising the power of sale hereby conferred shall be sufficient discharges to the purchasers, who shall not be bound to see to the application of such purchase-money.

VIII. No such sale as last aforesaid shall be made, until after six months' notice in writing given to the person, or one of the persons, entitled to the property subject to the charge, or affix on some conspicuous part of such property, but when a sale has been effected in professed exercise of the powers hereby conferred, the title of the purchaser shall not be liable to be impeached on the ground that no case had arisen to authorize the exercise of such power, or that no such notice as aforesaid had been given; but any person damnified by any such unauthorized exercise of such power, shall have his remedy in damages against the person or persons selling.

X. The person exercising the power of sale hereby conferred shall have power by deed to convey or assign to, and vest in the purchaser, the property sold, for all the estate and interest therein which the person who created the charge had power to dispose of: Provided that nothing herein contained shall be construed to authorize the mortgagee of a term of years to sell and convey the fee-simple of the property comprised therein in cases where the mortgagor could have disposed of such fee-simple at the date of the mortgage.

(1) *Real Estate Contract Act (IX. of 1872)*. See also *Agnew's Law of Trusts in England*, p. 127-28.

After property has been sold under a power of sale, the trustee should not let the purchaser into possession until the whole amount of purchase-money has been paid. The purchaser is not bound to pay the money to the trustees personally ; but payment to an authorized agent of the trustees will bind them and discharge the purchaser. (m)

If a trustee has wrongfully sold the trust-estate to a purchaser for valuable consideration without notice, the *cestui que trust* may either compel the trustee to purchase other lands of equal value, which lands will be held upon the trusts originally provided or he may take the proceeds of the sale with interest, or the present estimated value of the lands sold, after deducting any increase of price caused by subsequent improvements. (n)

Where a trustee has wrongfully disposed of trust-property, the *cestui que trust* may follow the purchase-money, or any other property that has been substituted in the place of the trust-estate, in the hands of the trustee or his representatives ; and such substituted property will be impressed with the same trusts as the original trust-property was subject to. (o) Thus, if a trustee expends the whole of the trust-money in the purchase of land, the *cestui que trust* will be entitled to the land. The *cestui que trust* must, of course, prove that the land was purchased with the trust-moneys. The presumption, however, is, that a purchase made by a trustee, whose duty is so to invest trust-money, has been made in execution of the trust. (p)

If any executor, undertaking a trust declared on the face of a will, neglects his duty, he is bound most faithfully to discharge his trust, or stand by the consequences that follow from his laches. But he will not be held liable for devasting, if the will was so framed as to mislead him, and he was not called

(m) Agnew's Law of Trusts in British India, p. 171.

(n) *Ibid.*, p. 184.

(o) *Rani Kattama Nachiar v. Bothagurusami Tevar*, 8 Mad. H. C. R. 293; *Greender Ohunder Ghose v. Mackintosh*, 1 L. R., 4 Calc., 908.

(p) Agnew's Law of Trusts in British India, p. 394.

upon to act differently from his own views, by any parties taking an interest under the will. (q)

In dealing with the Mutwallee of an endowment, it is not necessary for the purchaser to look further than to the power of the Mutwallee under his deed of trust. If the deed gives the Mutwallee the power and discretion to make a sale, it is not a matter of concern to the purchaser whether that power or discretion is judiciously exercised or not (r)

If the benamidâr or ostensible owner, having all the indicia of ownership in his hands, sells to a purchaser for valuable consideration, the true owner can only get rid of the effect of the alienation by shewing that it was made without his own acquiescence, and that the purchaser bought in good faith, and without notice, he acquires a good title as against the true owner and his heirs, or any subsequent purchaser from them. (s)

The following proposition of law are embodied in the Indian Trusts Act :—

(a) Where the trustee is empowered to sell any trust-property, he may sell the same subject to prior charges or not, and either together or in lots, by public auction or private contract, and either at one time or at several times, unless the instrument of trust otherwise directs. (t)

(b) The trustee making any such sale may insert such reasonable stipulations either as to title or evidence of title, or otherwise, in any conditions of sale or contract for sale, as he thinks fit; and may also buy-in the property or any part thereof at any sale by auction, and rescind or vary any contract for sale, and re-sell the property so bought in, or as to which the contract

(q) *Hogg v. Greenway*, 2 Hyde's Rep., 3—14.

(r) *Moonshi Golam Ali v. Mt. Soufutoonnissa Bibi*, W. R., 1864, 242. See also *Luteefun v. Bego Jan*, 5 W. R., 120.

(s) *Bhuwan Dass v. Upooh Singh*, 10 W. R., 185; *Rakhaldas v. Bindu Bashni Debby*, Marsh., 293; *Kallydass Mitter v. Gobind Chander Paul*, Marsh., 569; *Rennie v. Gunga Narain Chowdhry*, 3 W. R., 10; *Bhikhe Singh v. Bisponath Dass*, 24 W. R., 79; *Brojonath Ghose v. Koylash Chunder Banerjee*, 9 W. R., 599. [313.]

(t) Act IV of 1882, sec. 27. Cf. sec. 2 Act XXVIII of 1866, ante p.

is so rescinded, without being responsible to the beneficiary for any loss occasioned thereby.

Where a trustee is directed to sell trust-property or to invest trust-money in the purchase of property, he may exercise a reasonable discretion as to the time of effecting the sale or purchase (u)

(d) For the purpose of completing any such sale, the trustee shall have power to convey or otherwise dispose of the property sold in such manner as may be necessary (v)

As a tenant for life, though his consent be requisite to the exercise of a power of sale by the trustees, stands in no fiduciary position towards the remainderman, and is as free as any one else to buy from the trustees, a sale to him cannot be impeached on the ground of the purposes for which he buys, his motives being immaterial to the trustees, provided they sell on terms advantageous to the estate. (w)

Where trustees with a power of sale, enter into a contract for sale of the estate, which would be deemed a breach of trust, equity will not only refuse to interfere in favour of the purchaser, but will, even at the suit of the *cestui que trust*, restrain the trustees from executing the contract, and the purchaser will be left to his remedy by action for damages. (x)

(B)—SALES BY MORTGAGEE UNDER A POWER OF SALE.

It is usual in English mortgages to add a power of sale in case of default, which enables the mortgagee to obtain relief in a prompt and easy manner, without the expense, trouble, formality, and delay of foreclosure by a regular suit. "The vexatious delay," says Mr. Kent in his learned Commentaries, "which accrues upon foreclosure, arises, not only from the difficulty of making all proper persons parties, but chiefly from the power that Chancery assumes to enlarge the time for redemption on a bill to foreclose.* There are cases in which

(u) Act II of 1882 sec 38. *O.f.* Act XXVIII of 1866 sec 3 See ante p. 313.

(v) Act II of 1882 sec. 39.

(w) *Durconson v. Talbot*, L. R., 6 Ch. Ap Cases, 32.

(x) *Merrilock v. Buller*, 10 Ves. Jun. 292.

* Plaint or suit for foreclosure.

the time has been enlarged, and the sale postponed, again and again, from six months to six months, to the great annoyance of the mortgagee. These powers are found, in England, to be so convenient, that they are gaining ground very fast upon the mode of foreclosure by process in Chancery. Lord Eldon considered it to be an extraordinary power, of a dangerous nature, and one which was unknown in his early practice.

“ A power given to the mortgagee to sell on default, may be given by any person otherwise competent to mortgage These powers fall under the class of powers appendant or annexed to the estate, and they are powers coupled with an interest, and are irrevocable, and are deemed part of the mortgage security, and vest in any person, who, by assignment or otherwise, becomes entitled to the money secured to be paid ”(y)

The power of sale in a mortgage is of the nature of a trust ; the mortgagee like any other trustee, is bound to use all the means in his power to get the fairest and best price for the property. (z) He is bound to bring the estate to the hammer under every possible advantage to his *cestui que trust*. (a)

A mortgagee having a power of sale, cannot exercise it in a manner purely arbitrary, but is bound to exercise it with discretion ; not to throw away the property, but to act in a prudent and business-like manner, with a view to obtain as large a price as may, fairly and reasonably, with due diligence and attention, be under the circumstance obtainable. (b) If the power is exercised for exorbitant purposes, without a due regard for the interest of the parties, the Court will interfere. (c)

The effect of a sale under a power of sale, is to destroy the equity of redemption in the land, and to constitute the mortgagee exercising the power a trustee of the surplus proceeds, after satisfying his own charge, first for the subsequent incumbrancers, and ultimately for the mortgagor. The estate, if pur-

(y) Kent's Commentaries, 10th Ed Vol IV, pp 166—68. See also The Indian Contract Act (IX of 1872), sec. 202.

(z) Per Lord St. LEONARDS.

(a) Per Lord ELDON, *Downes v. Grangebrook*, 3 Mer., 208.

(b) Per Lord ELDON, *Barton v. C.*, *Mathie v. Edwards*, 2 CoR., 480.

(c) Per Lord ELDON, *164*, 16 L. J. Ch., 407.

chased by a stranger, passes into his hands free from all the incumbrances. There seems to be no reason why the second mortgagee, who might certainly have bought the equity of redemption from the mortgagor, should not equally with a stranger, purchase the estate when sold under a power of sale created by the mortgage. (d)

A sale, without the intervention of a Court of Justice, of mortgaged lands situate in the Mofussal of Bombay, under a power of sale contained in an indenture of mortgage in the ordinary English form, is valid, if due notice be given to the mortgagor of the mortgagee's intention to sell, and the sale be fairly conducted. (e)

When property mortgaged is situated in the Mofussal, but the parties to the mortgage are resident in Bombay, and the instrument of mortgage is in the English form, the parties must be held to have contracted according to English law, and to be entitled to enforce their rights according to that law. In such a case the mortgagee can exercise a power of sale contained in the mortgage-deed, and cannot be restrained from exercising such power, merely because the mortgagor has filed a suit for redemption. The mortgagor can only stay the sale *pendente lite* by paying the amount due into Court, or by giving *prima facie* evidence that the power of sale is being exercised in a fraudulent or improper manner, contrary to the terms of the mortgage. (f)

A mortgagee cannot, properly, in execution of a simple decree for money, the repayment of which is secured by mortgage, attach and sell the mortgagor's equity of redemption in the property mortgaged; but if he do so, and purchase it (directly or indirectly) himself, he becomes a trustee for the mortgagor, against whom he cannot acquire an irredeemable

(d) *Per* SIR J. W. COLVILLE in *Raja Kishen Datt Ram v. Raja Mumtaz Ali Khan*, L. R., 6 I. A., 160.

(e) *Pitamber Narayandas v. Vanmali Shamji*, I. L. R., 2 Bom., 1.

(f) *Jagjivan Nanabhai v. Shridhar Balkrishna Nagarkar*, I. L. R., 2 Bom., 252

title. (g) "No one," observed Mr. Justice Macpherson, "will ever give a fair price for an equity of redemption when the mortgagee is present himself as a bidder, and giving notice of his claims as mortgagee. The equity of redemption in such a case is knocked down to the mortgagor for a small sum which is carried to the mortgagor's account, in part satisfaction of the decree, and the property vests absolutely in the mortgagee, who then at his leisure proceeds to further execution of his decree, in order to realise the balance remaining due under it.

"It is true that the Court of Chancery will not as a rule prevent a mortgagee from pursuing all his remedies at once. But in England, an equity of redemption cannot be seized and sold, and the collateral remedies open to the mortgagee can be only proceedings against securities, or against the person or against the property, other than the equity of redemption of the mortgagor. The fact therefore, that, according to English law, all the remedies may be pursued at once, does not show that, if there were in England, a general power of attaching and selling an equity of redemption such as there is in this country, a mortgagee could, in the exercise of that power, sell and purchase his mortgagor's equity of redemption. On the contrary, the whole tendency of the English law is against such an inference. It is undoubted law that, when a mortgagee has a power of sale, if he sells in exercise of that power, he cannot himself purchase, that is to say, if he does purchase, he will be declared to be merely a trustee for the mortgagee. The mortgagee who sells (except where in judicial sales he obtains leave to bid as his trustee) is not allowed to purchase the mortgaged estate." (h)

In India, as in England, a mortgagee may transfer his Assignment of rights to a third person by way of assignment : mortgage. but such transfer must be without prejudice to the rights of the mortgagor. The mortgagee may put another

(g) *S. M. Kamini Devi v. Ramlechan Sarkar*, 5 B. L. R., 450. See also *Ramesh Chandra Dutt v. Shama Charan Bose*, 1 L. R., 1 Cal., 323-9; *Narayan Chandra v. Chandra Narayan Deb*, 10 B. L. R., 57.
(h) 5 B. L. R., at p. 450.

into his own position, but he cannot create a title in a third party distinct from his own title ; and in a suit by a mortgagor for redemption, where an assignment has been made without the knowledge of the mortgagor, the assignee is bound by the state of the account between the mortgagor and the mortgagee, although he may have paid more. (i) An assignment, therefore, should not in any case be taken of a mortgage without the privity of the mortgagor as to the sum due, for the assignee takes subject to the account between the mortgagor and the mortgagee, although no receipt be indorsed on the mortgage-deed for any part of the mortgage-money which has been actually paid off. (j) The Transfer of Property Act, provides that the person to whom a debt or charge is transferred shall take it subject to all the liabilities to which the transferor was subject in respect thereof at the date of the transfer. (k)

Where a purchaser from a mortgagee sues a Dur-makrari-dar for the cancellation of his makrari lease granted without authority by the mortgagor, it is competent to the defendant to contest the *bonâ fide* character of the mortgagee, although it was admitted by the mortgagor in a former suit brought by the mortgagee for possession and was conclusive as between the mortgagor and mortgagee, the colluding parties, inasmuch as the suit was brought to avoid the defendant's title on the strength of an alleged collusive mortgage. (l)

Property in the Mofussil which had been mortgaged in 1862 to C by a deed in the English form containing the usual power of sale on default of payment, and again in 1864 to T by deed of conditional sale, was sold by C under the power of sale and purchased by N. Previously to the sale T had foreclosed. In a suit for possession of the property brought by the widow of T against N and the mortgagor, it appeared that no notice of foreclosure had been served on N.—*Held* that N was

Right of a Purchaser from Mortgagee to notice of foreclosure from second mortgagee.

(i) *Ohinayya Ravutan v. Chidabaram Chett.*, 1. L. R., 2 Mad., 214.

(j) Sugden's V & P., 11th Ed., p. 217.

(k) Act IV of 1882, sec.

(l) *Dhanunjoy Dey Potedar v. Dwarkanath Singh*, 5 W. R., 280.

entitled to such notice by the fact of his purchase whether he had obtained possession or not, and that no notice having been served upon him, the suit was not maintainable against him. (m)

The provisions of the Transfer of Property Act, sec. 69* does not affect powers of sale in mortgages executed before the statute came into operation, viz. : the 1st of July, 1882.

(c)—SALES BY EXECUTOR OR ADMINISTRATOR.

According to the English law the charge of debts on the real and personal estate would probably be sufficient of itself to authorise a sale or mortgage by the executors for the payment of debts, and by the same law an executor may mortgage with a power of sale property which wholly vests in him, the power of sale given to the mortgagee not being a delegation of a power entrusted to the executor, but a creation of a new power for the benefit of the persons interested in the mortgage,

* ACT IV OF 1882, SEC. 69.

A power conferred by the mortgage-deed on the mortgagee, or on any person on his behalf, to sell or concur in selling, in default of payment of the mortgage-money, the mortgaged property, or any part thereof, without the intervention of the Court, is valid in the following cases (namely) :—

(a) where the mortgage is an English mortgage, and neither the mortgagor nor the mortgagee is a Hindu, Muhammadan or Buddhist ;

(b) where the mortgagee is the Secretary of State for India in Council ;

(c) where the mortgaged property or any part thereof is situate within the towns of Calcutta, Madras, Bombay, Karachi or Rangoon.

But no such power shall be exercised unless and until—

(1) notice in writing requiring payment of the principal money has been served on the mortgagor, or on one of several mortgagors, and default has been made in payment of the principal money, or of part thereof, for three months after such service ; or

(2) some interest under the mortgage amounting at least to five hundred rupees is in arrear and unpaid for three months after becoming due.

When a sale has been made in professed exercise of such a power the title of the purchaser shall not be impeachable on the ground that no case had arisen to authorise the sale, or that due notice was not given, or that the power was otherwise improperly or irregularly exercised ; but any person damaged by an unauthorized, or improper, or irregular exercise of the power shall have his remedy in damages against the person exercising the power.

(m) *Bhannorai v. Ghoudhrain v. Premchand Neogee*, 15 B. L. R., 28.

and, to render the mortgage effectual, the right to create that power being incidental to the authority of the executor to mortgage. By sec. 269 of the Indian Succession Act (X of 1865), executors and administrators may dispose of the property of a deceased person "*in such manner as they think fit.*" The power given by this section is unqualified. The language authorises an executor to sell or execute a mortgage with a power of sale. For the purposes of his office an executor is by the law of India invested with the same powers of conveying a testator's estate as the owner himself possessed. It is his duty to mortgage or sell the estate only when there is necessity for it, but in creating a power of sale in a mortgage, he does not delegate the duty imposed on him. As a general rule, *delagatus non potest delegare*; and therefore where a power of sale is given to trustees or executors they cannot sell by attorney. (n)

An executor, who is also a devisee of an estate charged with the payment of debts, may be presumed by a *bond fide* purchaser or mortgagee of that estate to be dealing with it for the purposes of the administration, and may give a valid title to A. Such purchaser or mortgagee, therefore, will not be bound to look to the application of the money. Mere absence of statement of the purpose for which the money obtained by the sale or mortgage is to be used, will not make the purchaser or mortgagee liable on the ground of a presumed knowledge that the money was to be applied otherwise than for the payment of the testator's debts.—In a case, therefore, in which the Lords were satisfied that the mortgagee himself was, as a matter of fact, entirely ignorant of any intended misapplication of the money by the executor and devisee of the estate charged, and that he had not constructive notice of it through his solicitor (who distinctly denied any knowledge or even suspicion of it): it was held that though the money was entirely misapplied, the mortgage could not be treated as subject to the debts of the testator, and the mortgagee's title was

(n) *Scale v. Brown*, I. L. R., 1 All. 710.

not, therefore to be postponed to the claims of the testator's creditors. The burden, therefore, of proving that the mortgagee or purchaser had notice of the true estate of facts, lies on the creditor of the testator who impeaches the mortgage or purchase. (o)

Under Act V of 1881 an executor or administrator of a deceased Hindu, Muhammadan or Buddhist has power, with the consent of the Court by which the probate or letters of administration was or were granted, to dispose of the property of the deceased, either wholly, or in part, in such manner as he thinks fit : Provided that the Court may, when granting the probate or letters of administration, exempt the executor or administrator from the necessity of obtaining such consent as to the whole or any specified part of the assets of the deceased. (p)

(D)—SALES BY AGENTS.

An agent cannot, of course, go beyond his authority. A sale by private contract by an *agent* authorized to sell by public auction is not valid, although the price be greater than was required. An agent to sell has no authority to receive the purchase-money, nor an auctioneer to receive more than the deposit. The auctioneer, as a stake-holder, should not part with the deposit until the sale is carried into effect. (q)

A directs B his solicitor, to sell his estate by auction, and to employ an auctioneer for the purpose. B names C, an auctioneer, to conduct the sale. C is not a sub-agent, but is A's agent for the conduct of the sale. (r)

If an agent, authorized to sell property, commits a fraud against his principal, the principal is the person who ought to suffer, and not a stranger. (s)

An agent, or person in a fiduciary position towards the owner of property purchased by him, is bound to prove, that the sale was made for good and sufficient consideration, and must not

(o) *Corser v. Oarwright*, L. R., 8 Ch., 971 ; 7 H. L., 731. See also *Glasse v. Mackintosh*, L. R., 4 Cal. 597 ; *ante*, p. 73.

(p) Act V of 1881, sec. 90. See *ante*, pp. 71—74.

(q) *Bagden v. F.*, 11th Ed., pp. 56, 56, 48.

(r) Act IX of 1872, sec. 194, Illus. (a).

(s) *Durga Narain Sen v. Harindanub Mohopadhyay*, I. L. R., 7 Cal., [200.

only prove that the agent had authority to sell, and that the consideration alleged was in fact paid, but also that the consideration paid was a fair price for the property.

If the purchase be made by a stranger, such a purchaser need not show that the consideration paid by him is a consideration equal to the value of the property ; it will be sufficient for the purchaser to show that the sale was made by a person who had authority from the owner to sell ; and unless the seller can establish a fraudulent connivance between the agent employed to sell and the purchaser, the sale will be binding on the seller on proof of authority of the agent to sell (*t*)

(E)—SALES BY CORPORATIONS.

Corporations in general have a right of alienation—*jus disponendi*—over lands and chattels held by them in their corporate capacity, except so far as such right of alienation is restricted by some positive law or statute.

A contract made by or on behalf of a corporation or public company created for special purposes, or by the promoters of such company, which is in excess of its powers, cannot be specifically enforced. (*u*) The directors of a Company have power to sell the concern with the sanction of a general meeting of the shareholders. If they contract to sell it without such sanction, the contract cannot be specifically enforced. (*v*)

A corporation affixing their common seal to a conveyance is tantamount to *signing* and sealing by an individual. (*w*)

Municipalities and other statutory owners constituted by Acts of the Legislature are usually empowered to sell or otherwise dispose of the lands and hereditaments vested in them. (*x*)

A corporation must sue and be sued in its corporate name, (*y*) and can be proceeded against in law only after service of the requisite statutory notice.

(*t*) *Mussamat Rutta Bebee v. Dumree Lal and others*, 2 N. W. P. H. C. Rep., 153.

(*u*) The Specific Relief Act (I of 1877), sec. 21 (*δ*).

(*v*) *Ibid.*, See 21 Illustration to (*e*).

(*w*) *Sugden's V & Pur.*, p. 971. See also sec. 42, Act X of 1866.

(*x*) Act IV of 1879 (B. C.) sec. 327.

(*y*) *Ramdoss Sein v. Cecil Stephenson*, 10 W. R., 366.

Section 12.—Conditional Sales.

A Court is not bound to consider a deed of sale to be a deed of *absolute* sale, and not take into consideration the acts and conduct of the parties in their own view and dealing in regard to the transaction. Thus where the parties treat a transaction as a deed of conditional sale, the Court must not necessarily hold it to be a sale. (z) So a conditional sale may become absolute by agreement and acts of the parties to it, without proceedings under s. 8, Regulation XVII of 1806. (a)

Where a *bonâ fide* sale is accompanied by a power to re-purchase, this will not make the transaction a mortgage, if such does not appear to have been the intention of the parties. (b)

Where land was sold on a condition of re-purchase and no time was mentioned in the instrument of sale, it was held, that the sale had not become absolute, and that the plaintiff having bought the original vendor's rights, was entitled to maintain a suit for the recovery of the land. (c)

A sold land to B and continued in possession as B's tenant. More than two years after the sale A and B agreed that A should have the right to re-purchase within a fixed time, but that such right should be forfeited if the conditions of the lease were not kept. The clause of forfeiture was so vaguely worded as to have the appearance of a mere threat. At the date of the agreement, A was in arrear with his rent. It was held that his right to re-purchase was not forfeited by his having incurred further arrears. (d)

(z) *Kashessuree Dossee v. Woma Churn Doss*, 5 W. R., 104.

(a) *Raghunath Doss v. Ram Gopal Doss*, N. W. P. H. C. Rep., 29 ; *Gurdial v. M. Hunsagoonwar*, 2 Agra Rep. A. C., 176.

(b) *Venkata Reddi v. Parvati Ammal*, 1 Mad. R., 485 note.

(c) *Gurusamy Aiyar v. Swaminatha Aiyar*, 2 Mad. R., 450.

(d) *Chidambaram Pillai v. Manikka Aetia*, 1 Mad. R., 63.

A conveyed land to B, with a collateral agreement to repurchase it within a certain period; the right to redeem however, being dependent upon the due performance by A of the conditions of a certain lease of the land in question which A, remaining in possession, agreed to take from B. The rent falling in arrear, B sold the land to C within the period allowed to A to redeem.

On appeal, the High Court set aside the sale, holding that there was no natural connection between the lease and the condition to redeem, and that the clause for forfeiture was so vaguely worded as to have the appearance of a mere threat, as in equity in the absence of specific mention of the nature of the failure which is to bring down the penalty of forfeiture, ought not to be enforced. (e)

V being in possession of a *Mootah*, upon which certain dues were owing to the Government, the land was advertised for sale by the Collector. K on the application of V, was induced to give a security for the payment of the Government dues by two instalments and to take a security for the repayment of that, as well as the repayment of another sum which V owed to another person and which he agreed to advance. On this agreement, a *Puttah* and *Arzee* were executed, both of which were necessary to authorize the Collector to make a transfer of the property to K. A *kurarnamah* was executed by V by which it was stipulated that if he should not pay the instalments fully, or that part of them should be in arrear, the *samindari* should continue under K, and that K should only return to V the rupees which might have been paid by him. The *Puttah* and *Arzee* were deposited with a third person, who was not to give them up to K for the purpose of enabling him to obtain the transfer of the property, until default should be made according to the agreement. On the same day a deed of defeasance was entered into between V and K, with a covenant that whenever K should take possession of the *Mootah*, for the purpose of enabling him to discharge the amount for which he became

(e) Anonymous, 1 Ind. Jur., O. S., 130.

security, as soon as he should have received out of the rents and profits the sums he had paid, with all expenses, he should restore the *Mootah* to V. It was held, although the *kararnamah*, with the *Puttah* and *Arzee*, purported to effect an absolute sale, the second deed had the effect of giving the contract the character of a mortgage or conditional sale. (f)

Where a deed, which on the face of it was described as a mortgage, stated that the grantee was already in possession under a previous mortgage by the grantor, and was under the second deed to receive the profits in liquidation of interest so far as they would go, and that the grantor was not to be liable to repay the principal money or such balance of interest (if any) as might accrue upon it, unless he adopted a son, and the grantee, unless that event happened, was to enjoy the property conveyed in right of purchase for the sum (principal and interest) due to him. Held that the deed was a sale liable to be converted into a mortgage, and not a mortgage liable to be converted into a sale. (g)

In Upper India mortgages are generally executed by way of conditional sales—*Khut-Kubalah* or *Bye-bil-wafâ*. (h) The expression “conditional sale” is in itself somewhat misleading. “I am aware,” said Sir Robert Stuart in *Alu Prasad v. Sukhan*, (i) “that it is frequently used in Indian Courts to denote a mortgage; but it is at least a loose and inaccurate way of expressing the contract which is known by the term mortgage, and it is better and simpler and more legally correct to keep to that term when such is the transaction than to make use of such a mere paraphrase as the expression ‘conditional sale.’” Mr. Justice Straight added:—“The use of the term ‘conditional sale’ is somewhat misleading, for it in point of fact only describes an hypothecation of land as security for a loan. The term ‘vendor’ and ‘vendee’ have no special virtue or force, and it would be as accurate to

(f) *Sri Rajah Kakerlapoody v. Sri Rajah Vatsavoy*, 2 M. I. A., 1.
Sukhabhat v. Vasudeobhat, I. L. R., 2 Bom., 113.
 (g) See Macpherson on Mortgages, 6th Ed., p. 8; also Act IV of 1882
 sec. 54, cl. (e).
 (h) I. L. R., 3 All. at p. 614.

call the one 'mortgagor' or 'pledgor' and 'mortgagee' or 'pledgee'. *The real nature of the transaction cannot be altered by the application of any technical terms to it.*" (j) The fair criterion, by which a Court is to decide whether a deed be a mortgage or not, is this :—Are the remedies mutual and reciprocal ? Has the vendee or obligee all the remedies a mortgagee is entitled to ? If the defendant has not all the remedies of the mortgagee, the transaction is a conditional sale. (k) If the parties intended an absolute sale, a contemporaneous agreement for repurchase not acted upon, will not of itself entitle the vendor to redeem (l). A *bond fide* purchaser of an estate or interest will not be considered a mortgagee on account of a right to purchase being given to a vendor, though at an advanced price. (m) The mere form of an instrument is not conclusive.

An instrument of conditional sale provided that the conditional vendor should retain possession of the property to which it related, paying interest on the principal sum lent annually at twelve per cent., and should repay the principal sum lent within seven years ; that (by the fourth clause thereof), in the event of default of payment of interest in any year, the term of seven years should be cancelled, and the conditional sale should at once become absolute ; and that (by the fifth clause thereof), in the event of the principal sum lent not being repaid at the end of seven years, the conditional sale should become absolute. Default having been made in the payment of interest annually as stipulated, the conditional vendee, the term of seven years not having expired, took proceedings to foreclose, in pursuance of the condition contained in the fourth clause of the deed, and the conditional sale was declared absolute. The conditional vendee then sued for possession of the property. *Held* that the

(j) 1 L. R., 3 All. at p. 632.

(k) *Per* LORD COTTREHAM, *William v. Oram*, 5 Myl. & Cl., 303.

(l) *Per* LORD MANNERS C., *Goodman v. Grierson*, 2 B. & B., 279 ; See also *Bapuji Apaji v. Senavarji*, 1 L. R., 2 Bom., 231 ; *Subabhat v. Vasudeobhat*, 1 L. R., 2 Bom. 113 ; *Lukshman v. Kanji*, 1 L. R., 4 Bom., 605.

(m) *Verner v. Winstanley*, 2 Sch. and Lef., 303.

fifth clause of the deed did not dispense with the necessity of complying with the provisions of s. 8 of Regulation XVII of 1806 and was compatible with them, and on or after the expiry of the stipulated period, application for the foreclosure of the mortgage and rendering the conditional sale absolute in the manner prescribed by that Regulation might and must be made ; that the condition contained in the fourth clause of the deed in effect defeated and violated the provisions of that Regulation, and summarily converted a conditional into an absolute sale in disregard and defiance thereof, and the foreclosure proceedings taken by the conditional vendee before the expiry of the period stipulated for the repayment of the principal sum lent were irregular, and the sale could only be rendered conclusive in the manner prescribed by that Regulation in pursuance of the fifth clause of the deed ; and that accordingly such suit was not maintainable. (n)

The plaintiff alleged that certain property was the hereditary property of himself and his brother N ; that it had been determined by an award that if the plaintiff or N desired to mortgage or sell their respective shares, they should, in the first instance, mortgage or sell to one another, and, if one party declined to take in mortgage or purchase, that the other shall be at liberty to alienate elsewhere ; that N had, however, executed a bond in favour of R, in which he had hypothecated the property, and stipulated that the debt should only be recoverable from the property hypothecated ; that N had confessed judgment in a suit brought against him by R on the bond, and had allowed a decree to be passed against the property ; and that, as the bond had the effect of a deed of a sale, and had been executed with an intent to defraud him, he sued to obtain possession of the property, and a declaration of his title thereto as purchaser. The lower Courts decreed the plaintiff's claim. R, in special appeal, pleaded that the plaintiff had no cause of action, the property not having been sold. *Held* (Pearson and Spinkie, J. J.) that the mere hypo-

Hypothecation
does not amount
to sale

(n) *Indra Lal v. Manohar Lal*, I. L. R., 3 All., 509—10.

thocation of the property did not give the plaintiff a title to it as purchaser, and that the suit, as brought, must be dismissed. (o)

In a suit for specific performance of an agreement to convey certain property, the contract which was Admissibility of parol evidence.

in writing was admitted by the parties, but the defendant alleged that there had been an understanding verbally come to, that if he repaid the consideration-money, with interest, &c., to the plaintiff within two years, the plaintiff would reconvey the premises to him. It was held, that the defendant could give parol evidence to supplement the written contract, and show that it was intended to be a mortgage, and not an absolute bill of sale. Mr. Justice Paul thus reviewed the leading cases on the admissibility of parol evidence in such cases laying down the principles of law and equity on the subject :—" In the case of *Muttylall Seal v. Anund Chunder Sandel* (p), a conveyance by way of Lease and Release was held to be subject to a parol defeasance, and to be in the nature of a mortgage, with a power of re-purchase on the footing of redemption, and a re-conveyance was accordingly decreed. There it was established that parol evidence was admissible to prove a parol defeasance. It is to be observed that in that case the Counsel for the appellant admitted that parol evidence was admissible, and the argument was confined to the question whether the parol defeasance was or was not sufficiently established in the circumstances of the case, and the Privy Council confirmed the judgment of the Supreme Court which held that the deed in the suit was controlled by a parol defeasance, and was to be treated on the footing of a mortgage. The same doctrine was admitted to be correct in the case of *Holmes v. Mathews*. (q) The principle on which a Court of Equity allows a parol agreement is the broad principle of fraud. Where a Court of Equity is satisfied that all the terms agreed on between the parties have not been committed to writing, and that it would be unjust to allow one

(o) *Raja Prithi Sing v. Daya Kishen*, 5 N. W. P. H. C. Rep., 226—25.

(p) 5 M. I. A., 72.

(q) 9 M. P. C. C., 413.

party to gain an undue advantage over the other in consequence thereof, it prevents the obtaining of such undue and unconscionable advantage. It is on the principle of fraud, undue advantage, and the like, that a Court of Equity acts in such cases. The rule of law stands unimpeached that a written agreement cannot be added to ; because when a writing takes place, all other matters which were open before, are considered as settled by the written agreement being entered into and executed. It is otherwise when parties agree that a written document shall be executed, not embodying all the terms by which they are to be bound, and when by express arrangement the written document does not embody all the terms, but only a part, parol evidence is admissible to show what was the entire agreement between the parties. (r)

A party, whether plaintiff or defendant, who sets up a contemporaneous oral agreement as showing that an apparent sale was really a mortgage, should not be permitted to start his case by offering direct parol evidence of such oral agreement ; but, if it appear clearly and unmistakeably, from the conduct of the parties, that the transaction has been treated by them as a mortgage, the Court will give effect to it as a mortgage, and not as a sale, and, therefore, if it be necessary to ascertain what were the terms of the mortgage, the Court will for that purpose allow parol evidence to be given of the original oral agreement.

Although parol evidence will not be admitted to prove directly that simultaneously with the execution of a bill of sale there was an oral agreement by way of defeasance, yet the Court will look to the subsequent conduct of the parties, and if it clearly appears from suit conduct that the apparent vendee treated the transaction as one of mortgage, the Court will give effect to it as a mortgage and nothing more.

It is a mistake to reject evidence of the conduct of parties to a written contract on the ground that it is only an indication of an unexpressed unwritten contract between them. Conduct

(r) *Bhatswala Khetry v. Kali Prasad Agarwala*, 8 B. L. R., 89—92.

is, no doubt, evidence of the agreement out of which it arose ; but it may be very much more. In many cases it may amount to an *estoppel*. If possession did not accompany or follow the absolute bill of sale, it would be a strong fact to show that the transaction was a mortgage, and not a sale ; and parol evidence would be admissible to explain the acts of parties, to show why the plaintiff did not take possession in pursuance of the bill of sale, it being found that the defendant retained possession, and that the plaintiff never had possession and was never forcibly dispossessed. (s) Again, if the holder of an absolute bill of sale were not only to allow the vendor to remain in possession, but were to take interest from him on the alleged purchase money, or allow him to go on improving the property, any Court would hold that the so-called vendee was estopped from enforcing his bill of sale. The answer to him would be, not that his conduct was evidence of an oral agreement converting the sale into a mortgage, but that, whether there had been such an agreement or not, he had by his conduct led the defendant to believe that he would treat the transaction as a mortgage, and that on the strength of such belief, the defendant had been induced to pay or spend money which would not otherwise have been paid or spent, and that under such circumstances the plaintiff was estopped from denying that the original transaction was one of mortgage. (t) In such a case it is clear that evidence of conduct would be strictly admissible under section 115 of the Indian Evidence Act (I of 1872). And, even when conduct falls short of a legal estoppel, there is nothing in the Evidence Act which prevents it from being proved, or, when proved, from being taken into consideration.

Courts of Equity in England will always allow a party (whether plaintiff or defendant) to show that an assignment of an estate, which is, on the face of it, an absolute conveyance, was intended to be nothing more than a security for debt, and

(s) *Per* SIR B. PEACOCK, C. J., *Kushinath Chatterjee v. Ohandi Ohurun Banerji*, 5 W. R., 68, B. L. R. Sup. Vol. 585.

(t) *Per* M. MELLVILLE, J., *Lukshman v. Kanji*, I. L. R. 4 Bom at pp. 600-1

they will not only look to the conduct of the parties, but will admit mere parol evidence, to show or explain the real intention and purpose of the parties at the time. The exercise of this remedial jurisdiction is justified on two grounds, *viz.*, (1) part-performance and (2) fraud in attempting to pervert a loan into a sale. (*u*)

The Courts in India are not precluded by the Indian Evidence Act from exercising a similar jurisdiction. The rule of estoppel, as laid down in section 115, covers the whole ground covered by the theory of part performance. That section does not say that, in order to constitute an estoppel, the acts which a person has been induced to do, must have been acts prejudicial to his own interest. Its terms are sufficiently wide to meet the case of a grantor who has simply been allowed to remain in possession, on the understanding and belief that the transaction was one of mortgage, and thus every instance of what the English Courts call "part-performance" would be brought within the Indian rule of estoppel.

But the ground upon which this jurisdiction of the Courts in India may most safely be rested is the obligation which lies upon them to prevent fraud. The Courts will not allow a rule or even a statute, which was passed to suppress fraud, to be the most effectual encouragement to it, and, accordingly, in England the Courts, for the purpose of preventing fraud, have in some cases set aside the Common-law rules of evidence and the Statute of Frauds. The Courts in India have the same justification in dealing similarly with the obstacles interposed by the Indian Evidence Act. In thus modifying the rules laid down by sections 91 and 92 of that Act, the Courts will not be acting in opposition to the intention of the Legislature, which by enacting the provisions of section 26, clause (c) of the Specific Relief Act (I of 1877) has shown an intention to relax the rules of the Indian Evidence Act, so as to bring them into conformity with the practice of the English Courts of Chancery. The words of proviso (1) to section 92 of the Indian Evidence

(u) Story's Eq. Jur., sec. 1522 (a).

Act^s are very wide; and it is not clear that they are not large enough to let in evidence of such subsequent conduct as, in the view of Court of Equity, would amount to fraud, and would entitle a grantor to a decree restraining the grantee from proceeding upon his document. (v)

Where the grantor executed to the grantee a document reciting a mortgage by the former to the latter of certain lands for Rs. 125, on which Rs. 200 were then due from the grantor to the grantee, and containing an agreement that the grantee should pay Rs. 75 to another creditor of the grantor, and purporting, in consideration of Rs. 275 so made up, absolutely to sell and convey the mortgaged lands to the grantee, and the grantee executed to the grantor a document of the same date reciting the sale of the mortgaged lands by the grantor to the grantee for the consideration of Rs. 275, and covenanting that the grantee should reconvey to the grantor the lands, the subject of the grant, if the grantor should repay to the grantee the sum of Rs. 275 within a certain period, and providing that, in case of default in such payment within such period, the covenant for reconveyance should become null,

Held that the transaction was a sale and not a mortgage, and that, consequently, the grantor had no right to redeem the lands after the expiration of the period so fixed for the payment of Rs. 275 by the grantor to the grantee, there being no evidence or allegation that, at the date of the execution of the two documents, Rs. 275 were an insufficient consideration for the sale of the lands, nor any stipulation that the grantee should account for the rents and profits received by him, or that the grantor should pay interest on the Rs. 275, nor anything to show that the grantor remained in possession after the execu-

* PROVISIO (v) TO SECTION 92 ACT I OF 1872

Any fact may be proved which would invalidate any document or which would entitle any person to any decree or order relating thereto; such as fraud, intimidation, illegality, want of due execution, want of capacity in any contracting party, want or failure of consideration, or mistake in fact or law.

(p) *Baksu Luktshman v. Govinda Kany,* I. L. R., 4 Bom., 594—609.

tion of the two documents, or that subsequently to that time any advances were made by the grantee to the grantor on the security of the lands, nor anything in either document which pointed to a right on the part of the grantee to recover from the grantor the sum of Rs. 275, or any part of it, before, at, or after the period named for the re purchase. (*w*)

As a general rule, therefore, when an instrument is on the face of it a conveyance or deed of sale, it is *not* open to the party who executed it to show by parol evidence that the intention of the parties was that it should not operate as a sale or conveyance. (*r*) It is, however, material to enquire whether, having regard to the acts and conduct of the parties and having reference to the amount of the alleged purchase-money and the real value of the interest to be sold, the parties intended the writing to operate as an absolute sale, and treated it as such, or as a mortgage only *y*). But although a Court may construe a bill of absolute sale to be a mortgage, if it appear *alunde*, as, for instance, by the acts and conduct of the apparent vendee himself, that the conveyance was intended as a mere security for money, and that it was so treated, yet the rights of a third party acting *bona fide* upon the faith of an absolute sale, *e. g.* the rights of a *bona fide* purchaser for value from the apparent vendee, would not be affected even by the acts and conduct of the original parties, and the third party would *not* be precluded by such act or conduct from having effect given to the contract as expressed by the writing. (*z*) In fine a third party acting on the faith of the written instrument could not be affected by any parol engagement; and a Court of Equity will give no relief against a *bona fide* purchaser for value from the apparent vendee, who had no notice of any act or oral agreement modifying the original bill of sale. Such a purchaser would take an absolute title. (*a*)

(*w*) *Bupuji Apaji v. Senavuraji Marvadi*, 1 I. R., 2 Bom., 231—47.
 (*x*) *Soakna Medhee v. Gundhoo Ram Mundle*, 12 W. R., 264; See also
 sss. 92, Ind. Evid. Act (I of 1872). [Vol., 383.
 (*y*) *Krishnath Chatterji v. Chandī Charan Banerji*, B. L. R. Sup.
 (i) *Per Sir Barnes Peacock, Ibid.*, B. L. R., Sup. Vol. at p. 290.
 (*z*) *Per M. Munir, J., Lakshman v. Kargi*, 1 I. R., 4 Bom., 600.

Section 13.—Of Sales Prior to or Pending Attachment.

The effect of attachment before judgment is to ensure that the property attached shall be forthcoming at the time of pronouncing the decree, to abide by whatever order the Court shall make upon it. (b)

Until attachment, creditors have no right to interfere with the power of their debtor to deal with his property. There is nothing in ss. 23 & 24 of Indian Contract Act IX of 1872, to support the opinion that at a sale made with the view to defeat a probable execution, would be a sale with a fraudulent and unlawful object, and therefore void within the meaning of those sections. A creditor, therefore, without a specific lien, (*i. e.*, a mortgage or other direct charge or incumbrance) has not any *a priori* right to debar his debtor from parting with his immovable property until it be attached in due course of law. The sale, however, must be a real transaction, and not a colourable one to shield the property from execution. The burden of proving that the deed of sale was colourable lay on the plaintiff. (c)

The owner of any property is not precluded by law from selling it before attachment, even though he knows that a judgment-creditor is seeking to get process of execution against it. (d) "If the plaintiff," observed Mr. Justice Phear, "gave full *bond fide* consideration for his conveyance, then he obtained a good title to the property from the owner notwithstanding that he knew the fact (if he did know it) that the present defendant was seeking to get process of execution against this property. The law only forbids transfer of property after it has been attached. Before it is attached, there is nothing to prevent the owner from selling it,

(b) *Java Ramji v. Jadabji Natha*, 1 Bom. H. C. Rep., 224.

(c) *Per WESTROFF C. J., & MELVILL J.—Rajan Harji v. Ardeshir Hormusji Wadia*, 1 L. R., 4 Bom., 70.

(d) *Ram Burun Singh v. Junkee Sahoo*, 22 W. R., 473—74.

if he can obtain a purchaser : and there is nothing to prevent any one from purchasing it. Indeed the best mode in which a judgment-debtor can obtain the means to discharge a decree standing against him might be for him to sell a portion of his property, and with the purchase-money to pay the debt. There is nothing whatever in the Civil Procedure Code to prevent a transaction of this kind. And the purchaser is not bound to see to the application of the money."

The prohibition against private alienation of attached property contained in s. 240, Act VIII of 1859, (s. 276, Act X of 1877 and Act XIV of 1882) relates only to alienation which would affect the creditor who obtained the attachment. (e) "The object of this section," said the Privy Council adopting the language of Sir B. Peacock, "was to make the sale null and void 'so far as it might be necessary to secure the execution of the decree ; it relates only to an alienation which would affect the creditor who obtained the attachment.' That appears to their Lordships to be the true meaning of the section. It could scarcely be held, in fact it was scarcely maintained in argument, that a sale made to a *bona fide* purchaser by the vendor (debtor) could be set aside by the vendor himself ; the words of the section must be read with some limitation. It appears to their Lordships that their construction must be limited in the manner indicated by the Chief Justice, on the ground that they were intended for the protection of the creditor who had obtained an execution, and not for the protection of all persons who at any future time might possibly obtain executions."

An alienation of property while under attachment is not absolutely void for all purposes and as to all persons, but voidable only, and capable of confirmation (f). In 1860 one Muhammad Ali (Defendant) executed a mortgage in favour of the plaintiff Gokul Chand of a land which was then

under attachment in execution of a decree obtained by the Government against the mortgagor. The decree having been afterwards satisfied, and the land released from attachment, the plaintiff was in the year 1862 put into possession by the mortgagor and continued in possession for five years until he was dispossessed in 1867. The Lower Courts passed a decree in the plaintiff's favour on the ground that the defendant having executed the mortgage cannot be allowed to annul his own act. The ground of special appeal taken was, that the mortgage having been made during the continuance of the attachment, was a private alienation of attached property and was therefore null and void under sec. 240 * of the Old Civil Procedure Code, and incapable of being confirmed or set up by any subsequent Act. The Allahabad High Court in delivering judgment in the case said :—"It is true that when attached property has become subject to the orders of the Court, and by the written order of the Court the owner is prohibited from alienating, and all persons are prohibited from receiving such property, after due proclamation of the order, any alienation during the continuance of the attachment is "null and void." But the right construction of these words does not, we conceive, require us in a case like the present to hold, that the mortgage transaction has never had effect, and is absolutely void. This literal construction of the words would enable a fraudulent vendor of property under attachment himself to set aside and avoid a sale of his land made possibly to one who had purchased in good faith, and without actual notice or knowledge of the attachment; and a provision, intended specially for the protection of creditors who had obtained decrees, would be abused by dishonest judgment-debtors for their own benefit. We are bound to take into consideration the policy and intent of law in ascertaining the meaning of these words; and bearing in mind the observations of the Privy Council in the case of *Ranee Surnoo Kaur v. Mahurajah Satis Chunder Roy Bahadoor* (g) upon

* Corresponding to sec. 276, Act X of 1877 (Act XIV of 1882.
(g) Sutherland's Privy Council Cases, p 548 See ante p 145.

the construction of similar words, we feel justified in holding that the words in question have not the effect of making the mortgage absolutely void for all purposes and as to all persons, but voidable only, and capable of confirmation. In this case the mortgagor, after the property had been released from attachment in 1862, delivered possession to the mortgagee, and it is not pretended that his possession then and during several subsequent years can be referred to any other title than that created by the mortgage of 1860. The mortgagor, therefore, has by his own act made valid the title of the mortgagee, and cannot now be permitted to dispute it. Whether he would be, without any subsequent act of recognition on his part, after the withdrawal of the attachment, permitted himself to repudiate his own deed, we need not consider, nor have we here to determine any question such as has arisen in some former cases between persons who have purchased either at sales in execution of decrees, or at a private-sale made after the withdrawal of the attachment on the one side, and the claimant under a private alienation made during the continuance of the attachment on the other; for it is the mortgagor himself who, in the present case, attempts to relieve himself from his own act.

"We have not adverted particularly to the language of the 243rd section of the Civil Procedure Code, which authorizes the postponement by the Court of a sale, to enable the judgment-debtor to raise the amount of the judgment by mortgage of the attached property. Whether the mortgage in the present case was made in order to raise funds to satisfy the decree does not appear. Assuming that it was not, we are still of opinion that the mortgagor cannot, under the circumstances, now treat it as null and void. The rule of construction laid down by the Privy Council in the decision we have quoted appears to us to govern the present case, and we shall, therefore, give effect to the mortgage. The defendant has by his acts, subsequent to the mortgage, shown that he had a full disposing power, confirmed

Any alienation of property, subject to a valid and subsisting attachment is null and void as against the attaching creditors and those deriving title under them ; unless such alienation can be shewn not to fall within sec. 240 of Act VIII of 1859. (h)

Under sec. 276, Act X of 1877 (Act XIV of 1882) any private alienation of property after attachment, whether by sale, gift, mortgage or otherwise, is declared "*void as against all claims enforceable under the attachment.*"

T sold a mouza, of which he was owner, to Z. At the time of sale, the mouza was under attachment in execution of a decree obtained against T by R. Z paid the amount of that decree to prevent the property, which she had purchased, being sold in execution. Z was under no obligation otherwise to pay the amount of the decree. It was held that the legal maxim, *caveat emptor* was wholly inapplicable and had no bearing whatever upon the case ; that a fraud had been committed by T against the plaintiff Z, T having concealed from her the factum of attachment ; and that therefore Z was entitled to recover against T the amount so paid to save the estate, which she had purchased and paid for, from being sold under the execution. (i)

A *bonâ fide* purchase for good consideration of attached property belonging to two debtors cannot avail to pass the rights of both when the sale is made by one of them, in whose name the property stands. (j)

(h) *Ram Krishna Das Surinji v Surfunnissa Begum* L. R. 7, I.A., 157.

(i) *Mussamat Zuhuran v. W. Tayler*, 2 B. L. R., A. C., 86.

(j) *Mirza Lutfoolla Khan v. Bajah Lilanund Singh*, 3 W. R., 171.

Section 14—Of Alienations *pendente lite*.

The Roman law regards property in suit as *res litigiosa* incapable, during the pendency of the litigation, of alienation or of longer possession in good faith. This however, is not inconsistent with rights, already equitably acquired, being formally completed during the litigation. The English maxim is merely *pendente lite nihil innovetur*, and its purpose is to prevent proceedings being made abortive by conveyances made in order to evade decrees. (k)

By the rule of *lis pendens* a decree pending a suit is not to be got rid of by a sale of the property in dispute by one of the parties while the suit is pending. (l) The effect of *lis pendens* is, that, pending litigation, the party shall not alienate (m)

The question of *lis pendens* was discussed at length in the late Supreme Court of Calcutta in the case of *S. M. Gour-money Debee v. Reid*. (n) In the course of his judgment Sir James Colville made the following observations. "Undoubtedly, the general doctrine of *lis pendens* is that the purchaser *pendente lite* is bound. If he purchases only an equitable interest, there is no necessity to bring him before a Court of Law, because the only place in which he can assert his title is a Court of Equity, and if he comes there to assert it, the answer to him is 'you are bound by the former proceedings.' But, if the legal estate be acquired, then the only machinery by which a Court of Equity can give full effect to the doctrine of *lis pendens* is to be found in a supplemental suit to which the purchaser is made a party, and in a decree compelling him to convey. For the Court would not compel the conveyance of the estate without having

(k) Per WILKES, J., 1 L. R., 6 Bond., 198.

(l) *Edwards v. Edwards*, 10 W. R., 459.

(m) *Edwards v. Edwards*, 10 W. R., 459.

(n) *S. M. Gour-money Debee v. Reid*, 10 W. R., 459.

before it all the parties claiming an adverse interest whether as trustees or cestui que trust, under the assignment *pendente lite*

"A party having the legal estate might convey that estate discharged of all trusts, by a bare conveyance of it to a stranger to the trusts, purchasing for value, and without notice; if the purchaser, though a purchaser for value, had actual notice of the trust, the Courts of Equity made him constructively a trustee; the trust was considered to be annexed to the land as against him. To meet the difficulty which existed in the majority of cases of proving actual notice, the doctrine of constructive notice followed, and that of *lis pendens* was merely a branch of constructive notice, proceeding upon the somewhat arbitrary assumption, that all the world must be deemed to have notice of the proceedings in a Court of Justice. It was invented thus, to prevent suitors from being baffled by voluntary conveyances by a party to the suit, that is by conveyances which, though for value, emanated from the voluntary act of a party to the suit, and might convey a better title than that of the party conveying to the party purchasing. It is a doctrine which, though it undoubtedly prevented many evils, has also been productive of many hardship, which has not been much favoured by Courts of Equity, and in England has recently been greatly restricted by Statute." (c)

If a purchase is made of property in litigation while such litigation is actually going on, the purchaser is affected in the same manner as if he had notice of the dispute, though in point of fact he had no express notice or knowledge of the circumstances. As between judgment-debtors and the decree-holder, the purchase of a decree by one of the debtors operates as a satisfaction of the decree, which can not, after such satisfaction, legally be executed. Should a sale take place of immovable property in execution of such a decree so satisfied, the sale is invalid; and if the proceedings leading up to the sale included specific objections thereto on the ground of such satisfaction, the purchaser cannot pretend to rely on any legal right as a

purchaser under proceedings valid upon the face of them, and of the invalidity of which he had no means of informing himself. (p)

With regard to the doctrine of *lis pendens* as affecting a purchaser it is now settled that it affects him, "not because it amounts to notice, but because the law does not allow to litigant parties, and give to them pending the litigation, rights in the property in dispute, so as to prejudice the opposite party." (q). It rests upon the foundation that "it would plainly be impossible that any action or suit could be brought to a successful termination if alienations *pendente lite* were permitted to prevail". (r) "A mere stranger," said Mr. Justice Phear upon a review of the English cases on the point, "cannot avail himself of the benefit of the doctrine. No one, I take it, except some one whose rights under the suit pending which the alienation is made, would be prejudicially affected if the alienation were allowed to remain good, can come in, and by the aid of the doctrine of *lis pendens* say that the alienation must in his favour be treated as being void". (s)

The Transfer of Property Act, 1882 provides that during the active prosecution in any Court having authority in British India, or established beyond the limits of British India by the Governor-General-in-Council, of a contentious suit or proceeding in which any right to immovable property is directly and specifically in question, the property cannot be transferred or otherwise dealt with by any party to the suit or proceeding so as to affect the rights of any other party thereto under any decree or order which may be made therein, except under the authority of the Court and on such terms as it may impose. (t)

The creditors of a deceased Muhammadan, whether in respect of dower or otherwise, cannot follow his estate into the hands of a *bonâ fide* purchaser for value to whom it has been alienated by the heir at-law, Purchase *pendente lite* from a Muhammadan debtor.

(p) *Dhambaree Debis v. Ishan Ohunder Sen*, 15 W. R., 372.

(q) *Bartholomew v. Sabine*, 3 Jur., N. S. 943, 946; S. C. 1 D. G. & J., 566.

(r) *Ex parte Jomay Tunson*, *Ibid.*, 3 Jur. N. S. 947-48.

(s) *Kathie Gossard Glass v. Pulchand Johari*, 6 B. L. R., at p. 478.

(t) Act IV of 1882, sec. 52.

whether by sale or mortgage. But where the alienation is made during the pendency of a suit in which the creditor obtains a decree for the payment of his debt out of the assets of the estate which have come into the hands of the heir-at-law, the alienee will be held to take with notice, and will be affected with the doctrine of *lis pendens*. (u)

Three brothers, M. L. B., P. K. B., and G. D. B. being jointly entitled in equal shares to an undivided one-third share in certain property, mortgaged their shares by three deeds bearing different dates to one R. N. Between the dates of the two last mortgages, the brothers instituted a suit for partition of the property, and for certain other objects; and, on 2nd February 1864, a decree was made in the suit, declaring the brothers entitled to a one-third share of the property, and ordering a partition and the taking of accounts, and reserving the question of costs. R. N. was not made a party to the suit. On 6th September 1864, the brothers covenanted to mortgage certain property to the plaintiff, including that previously mortgaged to R. N. on 8th and 9th December, the agreement was performed by conveyances in which R. N. joined, and which recited that he had been paid off; and on 28th November 1866 and 27th March 1867, the three brothers conveyed their equities of redemption to the plaintiff. On 15th June 1868, an order was made in the partition suit for the sale of a sufficient portion of the property to pay the costs of the parties to the suit, and under this order the property, which the plaintiff sought to recover in the present suit, was sold on 1st May 1869, and purchased by the defendant who, at the time, had full notice of the plaintiff's claim. It was held, the doctrine of *lis pendens* did not apply, and the plaintiff was entitled to recover possession. (v) Sir Richard Couch in confirming the judgment of Mr. Justice Phear on this case observed :—"With regard to the question of *lis pendens*, the doctrine appears to be this, that the alienee is bound by the proceedings in the suit after the

(u) *Syud Bazayet Hossein v. Dooli Chund*, 1 L. R., 4 Cal., 402.

(v) *Kallias Chunder Ghose v. Fulchand Juharri*, 8 B. L. R., 474.

alienation and before he becomes a party. Then the question is by what proceedings in the suit is he bound? Is he bound by the proceedings which arise from the nature of the suit, and from the case set up, and the relief prayed in the Bill, or is he to be bound by any order which the Court may be induced by the parties to make in the course of the suit? I can find no authority which goes to the extent of saying that, because he does not think fit to become a party to the suit, he is to be bound by any order whatever that may be made. It seems to me that he ought only to be bound by proceedings which, from the nature of the suit, and the relief prayed, he might *expect* would take place; and if there had been no notice in this case, it might have been necessary for us to determine what is the precise effect of *lis pendens*.....Practically, there is no substantial difference between *lis pendens*, and having notice of the suit. He would be equally bound by them, and not more by one than by the other. Looking at the decree of the 2nd February 1864, I am of opinion that the plaintiff cannot be taken to have *anticipated* that such an order for sale (as that of the 15th June 1868) would have been made in the suit, and it is *not* a proceeding by which he is bound."

Where a creditor obtains a decree against his debtor, and in execution puts up for sale, and himself becomes the purchaser of certain property of his debtor, which is already under mortgage to another, and such other has, previous to the decree and sale, commenced a suit on his mortgage-bond (although such suit has not proceeded to a decree), such judgment creditor, purchasing *pendente lite*, only obtains the right and interest of the mortgagor in such property, *viz.*, the equity of redemption, and does not acquire the property free from the incumbrance created by the debtor. (*w*)

Where the owner of a house, during the pendency of a suit by an unregistered mortgagee for foreclosure and sale,

(*See Ladd v. Kaur Prasad & Bala Singh*, I. L. R., 4 Cal., 789. See also *Raj Kishore Chandra & Rajkumarchand Haldar*, 21 W. R., 349.)

mortgaged the same house by a registered mortgage to another person, it was *held* that the last mentioned mortgagee had no title as against the purchaser under a decree for sale in the suit, although such purchaser was the plaintiff in the suit. (x)

On the 6th of September 1865, B obtained a Patni-lease of certain land from the Zemindar; and at an auction-sale by the Sheriff of Calcutta, on the 21st of February 1867, the Zamindar's interest was knocked down to B, and a conveyance of the property to him was executed by the Sheriff on the 1st of April 1867. On the 13th of March 1879, a suit for *khas* possession was brought against B by C who had bought the property at a sale in execution of a decree made on a mortgage thereof, the date of the mortgage being the 11th of January 1865, and the date of the decree being the 30th of November 1865. B pleaded adverse possession. *Held* that B's possession as Patnidar only could not be considered as adverse to C, who claimed the superior interest; that B's possession as purchaser could not be considered to have commenced before the date of the conveyance to him by the Sheriff,—namely the 1st of April 1867, and that, therefore, the plea of adverse possession was bad, since the suit had been instituted within 12 years of that date. In 1855, a decree for an account was passed, in the Supreme Court at Calcutta, against A, an executor. A died in 1856, and the suit which was revived against his representatives, came on for consideration on further directions on the 29th of August 1866. It was then found, that A's Estate was liable for Rs. 1,32,406-11-8, and his representatives were ordered to pay this money into Court. The representatives having made default in payment, a writ of *fieri facias* was issued, under which certain property was sold by the Sheriff of Calcutta and conveyed by him to B on the 1st of April 1867. Previously to this the representatives of A had, on the 11th of January 1865 mortgaged the same property together with other lands, "for the purpose of paying the Government revenue of certain

(x) *Gulubchand Munikchand v. Donds Valad Bhan*, 11 Bom. H.C. Rep., 64.

talucs belonging to A deceased," and the mortgagee having obtained a decree on his mortgage, the property was sold to C, in execution of the mortgage-decree, on the 30th of March 1867. In a suit for possession by C against B, the latter pleaded *lis pendens*. It was held that the nature of the suit, in which the decree of 1855 and the subsequent order of 1866 were passed, was not such as to warrant the application of the doctrine of *lis pendens* to the mortgage of the 11th of January 1865. It was also held that though the sale to B was made for the express purpose of paying the debts of A, B's title was not to be preferred to that of C, who claimed under the mortgage of 1865, which was made for the purpose of paying Government revenue. (y) The Calcutta High Court in delivering judgment in the case approved and adopted the *dicta* of Sir Richard Couch on the question of *lis pendens*. (z) Mr. Justice Pontifex in applying them to the facts of this case observed :— "It seems to us, that the mortgagee, who claimed under the mortgage of the 11th January 1865, could not at that time have *anticipated* that the order of the 29th August 1866, or the subsequent order in that suit directing this particular property to be sold, would be made; and therefore neither the mortgagee nor the plaintiff claiming under him, would be bound by the subsequent order for sale in that suit; and his mortgage, therefore, would be entitled to take precedence of the defendant's purchase in that suit. But then it is argued, that as the sale to the defendant was made for the express purpose of paying the debts of A. it ought to have priority over a mortgage made by the representatives of A, the money secured by which was avowedly not to be applied in payment of the debts of A. But the avowed purpose for which the mortgage was made was to raise money for payment of Government revenue, the payment of which would be in the nature of an insurance of A's property for the claim of his

(y) *Per PONTIFEX & FIELD J.J.*—*Karumunnessa Bibee v. Nairatna*
Bang. L. L. R., 3 Cal., 79.

(z) *See ante* p. 345—46; & *B. L. R.*, p. 489.

creditors, and such a mortgage would, therefore, be entitled to priority, and if the mortgage had not in fact been made to provide for payment of Government revenue still there is nothing in the record to show that the mortgagee was aware that there were unpaid creditors of A, or even if aware of that fact, that A's representatives intended to misapply the money advanced to them. And unless he was proved to have notice of both these circumstances, he would be entitled to insist on the validity of his mortgage as against the creditors of A. (a) We are, therefore, of opinion that the plaintiff's title as claiming through the mortgagee prevails over the defendant's title. But inasmuch as the defendant was a patnidar, she ought to have been made a defendant in the mortgage suit. In this country patnis, zurpeshgi-leases, and interest of that nature are very considerable interests in the land, and cannot be looked upon as mere leases for a term of years which a mortgagee might have the right to disregard. They are in fact substantial proprietary interests, on the grant of which, as in this case, considerable premiums are paid; and it is only equitable, that persons in that position should be allowed the opportunity of preserving their interests by redeeming any mortgagee made by the superior holder. In this case the patnidar was not made a party to the mortgage-suit; and therefore any decree in that suit would not affect her, and the plaintiff having purchased under that decree, can have no higher right against her than the mortgagee would have had, if he had made her a defendant to the suit on the mortgage." (b)

In a suit by the representatives of P. D., against his brother A. D., and after A. D's. death against his executors, it was found that there was over Rs. 1,32,400 due to the plaintiff from the estate of the deceased and on the 29th of August 1866, the executors were ordered to pay the sum into Court. The executors disobeyed; and on the 24th of December 1866, a writ of *fi-fa* was issued from the High Court, in execution of

(a) See *Greender Chunder Ghose v. Mackintosh*, 1. L. R., 4 Cal., 897.
(b) See *Byjnath Singh v. Goburdhon Lall*, 24 W. R., 210.

which certain property belonging to the estate of A. D. was sold to the defendants on the 18th of July 1867. Previously, however, on the 12th of October 1866, the executors had mortgaged the same property to the plaintiff, who brought a suit on his mortgage on the 10th of June 1867. On the 28th of August 1867, the present defendants were made parties to that suit, and in their written statement they alleged that they had been improperly made parties and claimed a title, superior to that of the plaintiff—a title prior to, and independent of, the mortgagors. That suit was dismissed with costs as against the present defendants, on the ground, that they were improperly added ; but a decree for sale was given against the executors, in execution of which the mortgaged property was sold to the plaintiff. In a subsequent suit brought by the plaintiff for possession,—it was held that the defendants were entitled to redeem, and were not affected by the suit of 1867 as a *lis pendens*. (c) “The doctrine of *lis pendens*,” said Mr Justice Cunningham, “appears to be grounded on the inconvenience which would arise, if mortgagors were able, after action brought, to alienate the mortgaged property ; but it does not follow that the rule would hold good where the alienation is not by the mortgagor, but by the Court, acting on behalf of creditors against the mortgagor, and where the process of sale, or at any rate proceedings with a view to the sale of the property had commenced before the suit was instituted. We think, therefore, that the plaintiff is not entitled, in virtue of having filed his suit previous to the defendants’ *fi-fa* purchase, to ignore that purchase, and to hold the mortgaged property free from any right which the defendants acquired by the *fi-fa* sale. We think that we are bound to give effect to the now recognized rule that the interest of a person, who has purchased the mortgagor’s equity of redemption, is not affected by any decree in a suit to which he is not a party, and to hold accordingly that the defendants, having purchased the mortgagor’s

interest in the estate, *viz.*, the right of redeeming the existing mortgage, did not lose that right of redemption in consequence of the decree obtained in a suit against the representatives of A. D." (d)

By an order passed under Act XIX of 1841, an Act for the protection of movable and immovable property against wrongful possession in cases of successions, A was declared entitled to take possession of a fourth share of her husband B's estate, which devolved upon her according to Muhammadan law. B's nephew C sued to recover this share on the ground that A had been divorced and this suit was pending when the present suit was brought by the purchasers of A's rights. As A never took actual possession of her share under her decree, and C was in possession of the whole estate, it was held that A's vendees could not be placed in a higher position than their vendor was when C's suit was brought against her, and that all that they were entitled to, was the right to represent her in the pending suit. (e)

On the 31st August 1863, A mortgaged his house to B, who brought a foreclosure suit, and on the 7th July 1866, obtained a decree against A for the sale of the house, if the mortgage-debt was not paid on or before the 24th March 1868. The debt not having been paid, the house was on the 15th July 1870, sold at a Court's sale, and purchased by C. In an action brought by the plaintiff to recover possession of the house on the ground that he had purchased it on the 2nd August 1868 at an execution-sale under a common money-decree against A: it was held that the plaintiff's sale was subject, not only to the mortgage of 1863, but also to the decree under which the right, title and interest of the mortgagor A. passed in 1870 to C, whose purchase was entitled to preference to the plaintiff's purchase in 1868. It was *further held* that if there had been no decree in the mortgage suit,

(d) I. L. R., 8 Cal. at p. 698.

(e) *Khajit Mahomed Goukur Ali Khan v. Mt. Sharufonissu Begum*, W. R. Sp., 94.

the fact that that suit had been instituted in 1866, and was pending in 1868, would have been sufficient to defeat the plaintiff's suit; his prior purchase (in 1868) having been made *pendente lite*, was completely subject to any decree which might be made in the mortgage-suit. (f)

On the 29th June 1876, the plaintiff obtained a money-decree by consent against Ramapa, the father-in-law of the defendant. On the 24th July 1876, the plaintiff attached a house of Ramapa. On the 12th October 1876, the defendant sued Ramapa for maintenance, and alleged that the house in question was the property of her deceased husband and Ramapa, and she claimed the right to continue to live in it. On the 10th of November 1876, and during the pendency of the defendant's suit against Ramapa, the house was sold under the plaintiff's decree against Ramapa, and the plaintiff himself became the purchaser. On the 20th of June 1877, the defendant obtained a decree against Ramapa in terms of the prayer of her plaint. On the 27th of August 1879, the plaintiff brought the present suit to eject the defendant from the house. *Held* that what the plaintiff bought from Ramapa was his right, title and interest in the house, which, being subject to the decree in the defendant's pending suit, the plaintiff's purchase was likewise subject to the same, and the circumstance that the plaintiff had placed a prior attachment on the house made no difference. The plaintiff, therefore, could not eject the defendant during her life-time. (g)

S having obtained a decree against M and another brought to sale and purchased M's property pending appeal. The decree having been reversed, *held* that M was entitled to the restoration of his property and not merely to the proceeds of the sale thereof. (h) In this case the purchaser was no other than the plaintiff in the suit who, averring that the interests of the appellant, the

(f) *Bhoji Narayan v. Krishnaji Lakshman*, 11 Bom. H. C. Rep., 139.
 (g) *Parvati v. Kisan Sing*, 1. L. R., 6 Bom., 566.
 (h) *Sudhakar Ayyar v. Muthu Sabapathi Chetti*, 1. L. R., 5 Mad. 106—8.

second defendant, were bound by a mortgage executed by his brother sued to enforce the lien, and, although he obtained a decree in the Court of the first instance, and caused the sale to be carried out, he was aware that the appeal had been instituted, and therefore, purchased subject to the result the reversal of the order for sale.

The proprietor of certain immovable property mortgaged it in July, 1875, to K and in September, 1875, to L. In October, 1878, he sold the property to K. In November, 1878, L obtained a decree on his mortgage-bond for the sale of the property. The suit in which L obtained this decree was pending when the property was sold to K. K sued L to have the property declared exempt from liability to sale in execution of L's decree on the ground that the mortgage to L was invalid, it having been made in breach of a condition contained in K's mortgage-bond that the mortgagor would not alienate the property until the mortgage-debt had been paid.

It was held that the purchase by K of the equity of redemption did not extinguish his security, it being his intention to keep it alive, and that the purchase of the property by K while L's suit was pending did not prevent K from contesting the validity of L's mortgage, so far as it affected him, on the ground that it was an infringement of the stipulation in the contract between him and the mortgagor. (i) A purchase of the equity of redemption does not necessarily extinguish the original security when as in this case it was manifestly the intention of the plaintiff to keep it alive. (j)

(i) *Tachmin Narain v. Koteswar Nath*, 1 L. R., 2 All., 826.

(j) *Story's Equity Jurisprudence*, 11th Ed., Vol. II Sec. 1035 (c).

Section 15.—Of Sales of Equity of Redemption.

An equity of redemption can be assigned by private contract, or attached and sold in execution of a decree by a creditor other than a mortgagee. (k) A mortgagee is not entitled by means of a money-decree obtained on a collateral security, such as a bond or covenant, to obtain a sale of the equity of redemption separately. To allow him to do so would deprive the mortgagor of a privilege which is an equitable incident of the contract of mortgage, namely, a fair allowance of time (usually six months) to enable him to redeem the property. (l) In *Ramlochan Sircar v. Kamini Debi* (m) an injunction was granted to restrain such a sale by the plaintiff upon a money-decree. Mr. Justice North in complying with the defendant's prayer observed: "Courts of equity will watch closely to prevent a mortgagee from making any unfair use of his position to the prejudice of his debtor; they will not allow a person standing in the relation of mortgagee, to take advantage of the necessities of the debtor to obtain any collateral advantages beyond the payment of the principal, interest and costs. The equity of redemption, if sold subject to the plaintiff's mortgage, with entire uncertainty as to what may be the amount of the charge which will eventually fall on it, must fetch absolutely nothing. Suppose a man has three estates, each worth Rs. 25,000, mortgaged to him to secure a sum of Rs. 40,000 the total value of the equity of redemption would, of course, be Rs. 35,000. But, suppose the mortgagee sold at different sales, held at different places, the equity of redemption of each estate separately, how much, can it be supposed, would be realised by the three sales. No one can doubt that the interest of the mortgagor would be

(k) *Bank of Bengal v. Nundo Lal Dass*, 12 B. L. R., 515—16.

(l) *Bhuggobutty Dass v. Shama Charan Bose*, 1 L. L. R., 1 Cal., 238—9.

(m) 5 B. L. R., 460—62 note.

utterly sacrificed: probably the equity of redemption would be for next to nothing, indeed it would be doubtful if, under the most favourable circumstances, a fifth of the value of the equity of redemption would be realised.

"Holding then, as I do, that the attempted sale is fraudulent and oppressive, and a shameful abuse of the process of this Court, I have no hesitation in staying the sale by an injunction restraining the plaintiff from proceeding with the same. I adopt the course of granting an injunction, because I am satisfied, from all the circumstances of the case, that, if I allowed the sale to proceed, irreparable injury would be done. The plaintiff must pay the costs of this motion" (u).

The question whether an assignment of an equity of redemption admitted by the assignor, was made for valuable consideration or not, is not material in determining the rights of the assignee against a party who holds adversely to the assignor (o).

A mortgagee purchasing the equity of redemption may indicate his intention to keep his charge on the property alive otherwise than by express words (p). "The successive charges created by the owner of an estate," said Mr. Justice

West, 'may be regarded as fractions of the ownership which embraces the aggregate of advantages that can be drawn from it. Each charge in its turn constitutes a deduction from the original aggregate, and the nominal ownership may itself thus be reduced to a small fraction of what it once was. Still, be it small or great, it is a possible object of sale or purchase, and there is no ground of reason for saying that an incumbrancer who is already owner of one

(o) 5 B. L. R., 460—62 (note)

(p) *Kachu v. Kachoba*, 10 Bom. H. C. Rep., 491.

(p) *Mulchand Kuber v. Lallu Trikam*, I. L. R., 6 Bom., 404 (F. D.) See also *Gopee Bundhoo Shantra Mohapattur v. Kalipudo Dattajee*, 23 W. R., 338; *Adams v. Angell*, I. B., 5 Ch. D., 634; *Gya Prasad v. Salik Prasad*, I. L. R., 3 All., 681; *Lakshmi Narain v. Kishan Das*, I. L. R., 2 All., 286; Act IV of 1882, sec. 101.

fraction of the property may not buy this other fraction without forfeiting the former fraction in favour of other fractional owners in the remainder left after the deduction of his prior share. A stranger could buy and hold the residual ownership without affecting the sequence of incumbrances. Why not one of the incumbrancers? The owner who buys in a first incumbrance cannot set it up against a second, but the first incumbrancer buying the residual ownership *can*; for what this purchaser bought was not really the 'ownership' as an aggregate of *all* possible rights, but the fragment of it left after a deduction of his own and all the other interests carved out of it. His purchase of this last fraction should leave the other fractions, including his own, in precisely the same position as before. The original owner, again, would have to satisfy the subsequent charges to the whole value of the estate; but that is because of a personal obligation resting on him—a personal relation between him and each incumbrancer binding him to satisfy the charge.....It seems, then, that the position of a purchaser of the owner's remaining interest and of a first incumbrancer, or the position of a first incumbrancer buying the remnant of ownership where there have been several successive mortgages, is quite distinguishable from that of the owner himself on account of the absence in the purchaser's case, of any general personal obligation which can be fixed upon the whole property so as to over-ride his own mortgage right in it. This has led to the doctrine that, though the original owner cannot set up a prior incumbrance got in by him against puisne charge, yet a purchaser whose money is expended partly or wholly in discharging an incumbrance, may, at his option set up such incumbrance as still subsisting for his own benefit as against the puisne incumbrancers. It was formerly thought that the desire to keep the security in force must be expressly stated; now as the case *Adams v. Angell* (q) shows, the intention may be gathered from indications outside the deed itself. Where the purchaser of the owner's residual right chooses to take the

(q) L. R., 1 Ch. D., 634.

owner's accompanying obligation, he may do so; but he is not under any compulsion to do so; no more where he happens to be a prior incumbrancer, than when he is (a stranger) altogether unconnected with the other parties except as purchaser.

"If an incumbrancer buying the equity of redemption, intends to retain the benefit of his charge, he must be allowed to retain it. Generally he will intend to retain it, and slight evidence will suffice to establish this. In the present instance the purchaser, the defendant's father, retained his mortgage-deed uncanceled, though he gave his mortgagor an acquittance in the deed of purchase. It cannot be supposed here, any more than in *Adam v. Angell* that the purchaser intended to part with his money or his right to money merely in order to make a present to a puisne incumbrancer; and his intention having been to retain the benefit of all his rights, his son the defendant may properly require redemption of his own first mortgage as the condition of plaintiff's enforcing the decree on his subsequent mortgage against the property."

The purchaser of an equity of redemption, whether he has taken possession or not, having purchased prior to foreclosure proceedings, must be duly served with the notice of the petition for foreclosure. (r) The importance of service of notice is to fix the mortgagor, and purchasers from him with knowledge that the year of grace, within which redemption can be effected, has begun to run out; and the year begins from service of the notice and not from the date of the issue thereof. (s)

In suit brought by purchasers of the equity of redemption of the mortgagor in a certain village against the mortgagee (the appellants), and others the purchasers of the same mortgagor's interest in certain other villages, all of which and certain others purchased by the appellants, were comprised in the same mortgage-deed, and in which suit the appellants contended that the whole proprietary right and interest of the mortgagor had vested in him; such

(r) *Norendra Narain Singh v. Dwarka Lal Mundur*, L. R. 5 I. A., 18.

(s) *Mahes Chunder Sen v. Mt. Tarini*, 10 W. R., F. B., 27.

purchasers were allowed to redeem and recover possession of their village, on payment of the proportion of the mortgage-debt attributable to such village. The proportion of the debt chargeable on such village ought to vary according to the actual value of the village; and the amount of Government revenue assessed on a village may not always be a correct criterion of its actual value. (i)

The purchaser of the equity of redemption of part of an estate under mortgage is entitled to redeem the whole of the mortgaged estate, if the mortgagee insists on his right to have it so redeemed. When the former elects to pay the entire mortgage-debt, he puts himself in the place of the mortgagor redeemed, and acquires a right to treat the original mortgagor as *his* mortgagor, and to hold that portion of the estate in which he would have no interest but for the payment as a security for any surplus payment he may have made. (ii) In a case where two villages were held under one mortgage, and the mortgagor's right, title and interest in one of the villages was sold by public auction, the right of the purchaser to sue for the redemption of the entire mortgage was upheld. (v) The Madras High Court in delivering judgment in the case observed:—"The sale of the equity of redemption of a part of the estate carries with it an implied authority from the original mortgagor to render what is in law necessary to make it effectual, and this, we think, is the foundation for the equity arising from the extra-payment made by the purchaser. The purchaser *must* redeem the entire estate, or not at all, if the mortgagee objects to his security being divided, and the rule of equity that makes it incumbent on him to pay more than what he would be bound to pay as between himself and the original mortgagor, gives him also a right to hold the village not included in his purchase as a security for the extra payment he may have made."

(i) *Nawab Asimut Ally Khan v. Jowahir Sing*, 13 M. I. A., 404.

(ii) *Chelmondely v. Clinton*, 2 Jac. & W., 184.

(v) *Amurath Kanyiam v. Vamana Rau*, L. L. R., 2 Mad., 223.

The purchaser of an equity of redemption, with notice of subsequent incumbrances, stands in the same situation, as regards such subsequent incumbrances, as if he had been himself the mortgagor: he cannot set up in opposition to such subsequent incumbrances either a prior mortgage of his own, or a mortgage which he or the mortgagor may have got in. (w)

Although a purchaser of an equity of redemption enters into no obligation with his vendor, to indemnify him from the mortgage-money, yet equity, if he receives the possession, and has the profits, would independently of contract raise upon his conscience an obligation to indemnify the vendor against the personal obligation to pay the mortgage money; for having become owner of the estate, he must be supposed to intend to indemnify the vendor against the mortgage. (x)

A member of a Joint Hindu family granted a usufructuary mortgage: he subsequently, without the knowledge of the co-partners, released the equity of redemption: on hearing of this the co-partners contested the validity of the release: *Held* that the parties claiming from the person to whom the release was made took, so far as the co-partners were concerned, a title only as mortgagees. (y)

The assignee of the purchaser of land sold in execution of a mortgage-decree obtained by a mortgagee against the mortgagor alone, is not entitled to eject a puisne mortgage. (z)

* Under the Transfer of Property Act (IV of 1882), sec. 80, no Tacking abolished. mortgagee paying off a prior mortgage, whether with or without notice of an intermediate mortgage, shall thereby acquire any priority in respect of his original security. And, except in the case provided for by section seventy-nine, no mortgagee making a subsequent advance to the mortgagor, whether with or without notice of an intermediate mortgage, shall thereby acquire any priority in respect of his security for such subsequent advance.

(w) *Ichdram Dayaram v. Raji Jaga*, 11 Bom. H. C. Rep., 41.

(x) *Per* LORD ELDON, 7 Ves. Jun., 337; Sugden's V. & P., 11th Ed., p. 218.

(y) *Radhanath Dass v. Gisborne & Co.*, 14 M. L. A., 1; 6 B. L. R., 530.

(z) *Venkata Somayarula v. Kunnam Dhora*, I. L. R., 5 Mad., 184.

Section 16.—Of Sales of Reversions, Rights of Entry &c.

Under the Roman law all things adapted to commerce and susceptible of appropriation may be sold, unless the sale of them is prohibited by Law. There may be a valid sale of a thing which is not in existence at the date of the contract, as the future produce of an estate, and even the chance of gain may be sold, such as the hope of a succession or the cast of a net. (a)

Under the English law, a *bonâ fide* sale of a reversionary interest cannot be set aside, whether the vendor be an heir or not, unless fraud or imposition be expressly proved, or be implied from the inadequacy of the consideration or other circumstances attending the sale. (b)

The case of an heir selling his expectancy stands on its Strength on sales by expectant heirs. own grounds, and very slight circumstances will enable equity to set aside the contract. An unconscionable bargain made with an expectant heir shall not only be looked upon as oppressive in the particular instance, and therefore avoided; but as *pernicious in principle*, and therefore repressed. There are two powerful reasons why sales of reversions by heirs should be discountenanced: the one, that it opens a door to taking an undue advantage of an heir being in distressed and necessitous circumstances, which may, perhaps, be deemed a private reason; the other is founded on public policy, in order to prevent an heir from shaking off his father's authority, and feeding his extravagances by disposing of the family estate. But a *bonâ fide* purchase at an auction, of a reversion, cannot now be impeached. (c)

The time, however, is more particularly attended to in sales of reversion; for it is of the essence of justice that such

(a) Mackenzie's Studies in Roman Law, p. 208.

(b) Sedgwick V. & P. 11th Ed. p. 314

(c) Lord St. Leonard's Handy-Book of Property Law, 7th Ed., p. 47.

contracts should be executed immediately, and without delay. No man sells a reversion who is not distressed for money; and it is ridiculous to talk of making him a compensation by giving him interest on the purchase-money during the delay. (*d*)

Under the Transfer of Property Act, 1882, the chance of an heir-apparent succeeding to an estate, the chance of a relation obtaining a legacy on the death of a kinsman, or any other mere possibility of a like nature, cannot be transferred. (*e*) But this provision does not affect any rule of Hindu, Muhammadan or Buddhist law, nor any right or liability arising out of a legal relation constituted before the Act came into force, nor any relief in respect of any such right or liability. (*f*)

The plaintiffs sought to recover from the defendant certain property under a deed of sale executed in 1851 by his mother and natural guardian, the defendant being then a minor. At the time of the execution of the deed, the defendant's interest in the property in question was merely a reversionary one, expectant on the death of two widows, who did not die till 1870: *Held* that it lay on the plaintiffs to prove a justifying necessity for the sale, and that in the absence of all evidence on this point the suit must fail. *g*) Upon the question whether the defendant's interest in the property at the time of the execution of the deed of sale by his mother, being a mere expectancy, was capable of being the subject of sale at all, the Judicial Committee of the Privy Council said that the question was "one of general importance, and one which their Lordships, who do not sit here to determine abstract questions of law, would be unwilling to determine in a case in which no decree in favour of the plaintiffs can be passed. They were certainly not prepared to affirm that such an interest can be made the subject of a sale, still less that it can be made the subject of a sale highly speculative as any such sale must be, by a guardian

(*d*) Sugden's V. & P., 11th Ed., p 292.

(*e*) Act IV of 1882, sec 6, (*a*). See also *ante* pp 8—9.

(*f*) *Ibid*, sec 2, (*c*) & (*d*)

(*g*) *Dooli Chand v. Brij Bookun Lal Awasthi*, 6 Cal. R., 528 (P. C.)

acting or purporting to act on behalf of an infant. The decision of this Board which has been cited by the Judge of the lower Court, is not precisely in point, but it goes far to show that the principle of English law which allows a subsequently acquired interest to feed, as it is said, the estoppel does not apply to Hindu conveyances." (h)

Where the purchaser knows the interest he is buying is a contingent one, he will be presumed to have bought it at a risk. A person, who with notice, buys property subject to a contingency, which may defeat or destroy the interest which is the subject of sale, is not entitled to be relieved from his bargain and to recover the purchase-money, merely because the contingency contemplated actually happens, and the property either does not become, or ceases to be, available for his benefit. (i) "The Chancery mends no man's bargain. *Caveat Emptor* is a very needless advice, if Chancery can establish another rule instead of it by declaring that equity must suffer no man to have an ill bargain." (j)

A reversionary contingent interest subject to the life-estate of a Hindu widow may be assigned. The assignee of such an interest is entitled to restrain the widow from committing waste. (k) "We see nothing so peculiar," said the Calcutta High Court (Raikes, and Pandit, J.J.), "in the position of a Hindu reversioner that he should be excluded from disposing of his contingent interest if he pleases. It is true that the reversioner of to-day may not eventually prove to be the heir who succeeds to the property at the death of a Hindu widow, but that is a risk that the purchaser has to encounter and cannot invalidate his purchase. Neither can such purchase deprive the nearest relations of the deceased husband of the exercise of that free agency which under the Hindu law they possess,

(h) *Douli Chand v. Brij Bhokan Lal Aronsti*, 6 Cal. R., 532 (P. C.)
See also *Kali Chunder v. Shib Chunder*, 6 B. I. R., 501; 15 W. R., 12 (P. C.);
Ranee Bhabo Soondari v. Issur Chunder, 11 B. I. R., 36.

(i) *Ram Tulul Singh v. Bissessar Lal Sahoo*, 15 B. I. R., 208, (P. C.)

(j) *Per LORD CHANCELLOR FINCH, Maynard v. Mosley*, 3 Swauston, at pp. 653, 655.

(k) *Rye Churn Paul v. M. Peary Monce Dasser*, Marsh., 622,

"as the sanctioning the sale of the widow in accordance with her husband's property to the extent permitted by the Hindu law all these matters constitute the case which I put before you, but this was for him to consider and not for the Court. If, then the reversioner can sell, and if he by placing another in his position, we see no reason why the latter should not have the same means of protecting the property as we give to him, as the actual owner. But the vendor is not a reversioner; he retains his rights. The right of a reversioner to restrain the life-tenant from conveying was not confined to Hindu reversioners, but is a right, it appears to us, common to all who have such interests to protect." (i) The correctness of these dicta was questioned by Mr. Justice Phear, who in a later case held that during the existence of a Hindu widow's interest in an estate, the assignee of a reversionary heir to her husband has no interest therein as such assignee, which will enable him to bring a suit to have a mortgage and decree affecting the estate set aside. This is so even though the assignee is the next heir to the property after the assignor. (ii) Mr. Justice Phear said: "It appears to me that pending the existence of the widow's interest, the assignee of a Hindu presumptive heir has no interest in the property of the deceased person of whom the assignor is the heir. He has only a *personal* right under his contract against his vendor, a right which he would be able no doubt to enforce against the vendor whenever the latter should come into enjoyment of the property by the death of the widow. It may even be doubted whether he could enforce that contract against his vendor's sons, supposing the vendor died before the property fell in, and his issue took it after his death, for they would take, not as heirs to their father, but as heirs of the original proprietor. It is not necessary, however, that I should express any definite opinion on this point. While the widow is alive, she has, to use English terms, the whole estate of inheritance in her. In this view, the assignee is in all respects a

(i) Marshall's Report at p. 624

(ii) *Rai Charan Pal v. Pyari Mani Das*, 3 B. L. R. (C. C.), 70

stranger to the property, and will remain so till the time comes* when he can claim the benefit of his contract with the assignor."

In *Raja Suhb Prohlad Sen v. Baboo Budhu Sing* (n) and in *Rani Bhobosundari Dasi v. Issur Chunder Dutt* (o) the Judicial Committee clearly stated their view of the law to be that the execution of a bill of sale by a Hindu vendor does not pass an estate, unless there be a transfer of possession actual or constructive, and that, consequently, the sale of an estate by a person who is not in possession cannot operate as a present conveyance, nor enable the purchaser to sue in ejectment.* (p) In *Bai Suraj v. Dalpatram*, a Full Bench of the Bombay High Court followed this ruling of the Privy Council and held that a Hindu vendor cannot by a bill of sale pass corporeal property of which he is not in possession, but that he may convey a right of action,—a right of entry or equity of redemption—either in express terms or by the use of such language as indicates that that, and nothing else, was the intention of the bill of sale. "It must be confessed," observed Melvill J., "that it savours somewhat of technicality to insist that the result should be wholly different, merely because the bill of sale purports to convey the estate itself, not the right of entry or the equity of redemption. It is not, however, a disadvantage that persons in this country should be compelled to do what they seem very unwilling to do, namely to state the truth, and express their real intentions, in the instruments which they execute. It would tend to honest dealing if, in such documents as that relied upon by the plaintiff in this case, the vendor were to admit that he was out of possession, and was merely selling his right of action instead of falsely pretending that he sold an estate of which he was in possession, and that he put the purchaser in possession at the time of the sale. We do not, therefore, see that we need be astute to find arguments for explaining away the Privy

(n) 12 M. I. A., 275, 307; S. C., 2 B. L. R. (P. C.), 111.

(o) 11 B. L. R. (P. C.), 35.

(p) *Per* MELVILL J., in *Bai Suraj v. Dalpatram*, 1 L. R., 6 Bom., 386.

* It must be borne in mind that the conveyances in these two cases were of a ~~chattel~~ chattel or speculative character.

Council decisions, and we are quite prepared to follow them to the full extent to which, we think, they were intended to go." (q)

A Hindu, whose estate is in the possession of a trespasser ^{Side of right of entry by a Hindu.} or mortgagee, may sell his right of entry as such, or his equity of redemption as such, and the purchaser may thereupon sue to eject the trespasser or to redeem the mortgage ; (r) but in the Bombay Presidency a bill of sale by a Hindu vendor, purporting to convey the *estate itself*, executed by a person who is not in possession, cannot operate as a present conveyance, nor enable the purchaser to sue in ejectment. Cases, however, will often arise in which, though a bill of sale may in terms purport to convey the property itself, yet it is clear upon the face of the instrument that the intention of the parties was to convey the right of entry or the equity of redemption, and nothing more. In such cases the Court should not lay stress on the mere terms of instrument which follow a certain established usage, but give effect to the intention of the parties, and recognize the purchaser's right of action.(s) Where a Hindu vendor in the Bombay Presidency sold his share in certain land, but expressly stated that he was out of possession ; that the land was in the possession of a third party to whom it had been mortgaged without the vendor's authority ; and that thereupon he, the vendor, empowered the purchaser to bring a suit against the person in possession in order to recover the vendor's share in the land, with mesne profits : *Held* that what the deed contemplated was nothing more than the transfer of the right of entry, although according to the invariable mode of expression in such documents, the vendor professed, in terms, to convey the property itself. *Held* further that the purchaser acquired the same right of action which the vendor possessed, notwithstanding that the vendor was not in possession at the date of the sale. (t)

(q) *Bai Suraj v Dalpatram Dayashanker*, I. L. R., 6 Bom., 380 (F.B.)

(r) 25 W. B., 48 ; 14 B. L. R., 307 ; I. L. R., 1 Cal. 297. See *ante* pp. 49—50.

(s) *Per MELVILL, J.*, I. L. R., 6 Bom. at p. 386—87.

(t) *Vasudev Hari Patwardhan v. Tatia Narayan*, I. L. R., 6 Bom., 387.

A sale among Muhammadans, unlike a sale between Hindus, is valid as against a third party, even though the vendor was not at the time of sale in possession of the property sold. (u)

Alleged purchasers, whose vendors were not in possession and who pay nothing for what is said to have been sold to them, are not competent to maintain a suit for possession of the property in dispute. (v) If a man contracts with one who has no title, who is not owner or entire owner, the maxim *caveat emptor* applies and he must suffer the consequences. As a general rule, Courts in India discourage speculative purchases and sales of doubtful titles at a nominal or grossly inadequate price, and will not help the vendee in recovering back his purchase-money, if the bargain turns out a losing one. (w)

Where N alienates to K a moiety of his title and interest Champerty. in certain property under an *ekrar* or agreement, to enable him to meet the expences to be incurred for its recovery, this *ekrar* is not a present transfer but an agreement to transfer so much of the property as may be recovered; and the plaintiff who purchased from K cannot recover against the principal defendant, the person in possession, who was no party to the deed. Such a suit is based on a transaction which is void as contrary to public policy. (x)

Under Stat. 11 & 12 Cap. 21 the reversionary or contingent interests in land of insolvents in the Presidency-Towns are liable to be sold by the Official Assignee for the benefit of creditors. But discretionary power is vested in the Insolvents' Courts to delay or postpone such sales (if necessary) and "to make such order touching the sale or disposition or management of such property as to such Courts may seem reasonable and beneficial." (y)

(u) *Adam Khan v. Alarakhi*, I. L. R., 6 Bom., 645.

(v) *Bishoath Dey v. Ohunder Mohun Dutt*, 23 W. R., 165.

(w) *Muhammad Mohidin v. Ottayil Ummacke*, 1 Mad., 390; *Mahees Ohunder Chatterjee v. Issur Ohunder Chatterjee*, 1 Ind. Jur., N. S., 268.

(x) *Tara Soondari Ohoudhrain v. The Court of Wards*, 20 W. B., 446.

See however *Abdul Hakim v. Durga Prasad Banerjee*, I. L. R., 5 Cal. 4.

(y) 11 & 12 Vic., Cap. 21, sec. 32.

CHAPTER V.

TRANSFER OF WAQF * OR DEBUTTER † PROPERTY.

One test of an endowment as to whether it is *bona fide* or nominal, is to see how the founder himself treated the property and how the descendants have since treated it (z)

Property may be given away or devised subject to a trust in favour of an idol or for some religious or charitable endowment. (a) Where property is wholly dedicated to pious purposes, it can not be sold; but a *shebait* may alienate a reasonable portion of the endowed property, if the alienation is absolutely required by the necessities of the management, such as the restoration of the idol or the repair of the temple. (b)

A Hindu by will devised certain property, consisting of a family dwelling-house and land, to trustees for ever, for the residence, maintenance and performance of worship of certain family idols, and appointed his sons and their descendants in the strict male line to be shebait

* *Waqf* in its primitive sense means "detention." In the language of the law, it signifies the appropriation of a particular thing to pious or charitable purposes. Upon an appropriation becoming valid or absolute, the sale or transfer of the thing appropriated is unlawful, because of a saying of the Prophet—"Bestow the actual land itself in charity in such a manner that it no longer shall be saleable or inheritable." Hamilton's Hedaya (Book XV), p. 331.

† The word *Debutter* (from Sanskrit *Devatru*) means property dedicated to a god or goddess. It applies to lands granted for the support of a Hindu shrine or temple. *Debutter* lands are mostly rent-free; and so are *Brahmottar* (land originally given to Brahmins), *Krishnarpan* (given to Krishna), *Pirottar* (land originally given to a Muhammadan saint) and *Fakirottar* (land originally given to a Fakir). But all these are frequently the subject of sale by local custom.

(z) *Gangavaruin Sirkar v. Brindaban O. Kur Chowdhry*, 3 W. R., 142

(a) *Soutun Bysack v. S. M. Jaggut Soondar Dassee*, 8 M. L. A., 66.

See also *Ashutosh Dutt v. Durga Churun Chatterjee*, I. L. J., 5 Cal 434

(b) *Tukboonnissu Bibee v. Kumar Sham Kishore Roy*, 15 W. R., 228.

of the idols for ever, making provision for their residence in the family dwelling-house; the will also contained a clause restraining any partition, division or alienation of the property so dedicated to the worship of the idols. The testator appointed the trustees executors of his will, and by a codicil bequeathed legacies to various members of his family. In a suit against the executors to recover a legacy so bequeathed, it was held that the devise of the property to the idols was void and inoperative, as being a settlement in perpetuity on the male descendants of the testator, and for their use, and *not* a real dedication for the worship of the idols. (c)

Although a property wholly dedicated to religious purposes cannot be sold, yet where a portion only of its rents and profits is charged for such purposes, the property may be sold subject to the charge with which it is burdened. (d)

Religious endowments in this country, whether they be Hindu (*Devasthan*) * or (*Sevasthan*) † or Mahomedan (*Waqf*), are not alienable, though the annual revenues of such endowments, as distinguished from the *corpus*, may, for purposes essential to the temple or other institution endowed, be occasionally pledged : (e) *ex gr.*, “for the proper expenses of keeping up the religious worship, repairing the temples or other possessions of the idol, defending hostile litigious attacks, and other like objects. The power, however, to incur such debts must be measured by the existing necessity for incurring them.” (f)

Where, however an endowment is merely nominal and the property has been dealt with as private property, a sale of such property is valid under the Hindu law. (g) A purchase in idol's name is not unfrequently a mere *benami* transaction.

* S. *Deva*, L. dev = god; *asthan* = place. † S. *Seva* = worship, service.
 (c) *Pramotho Dossee v. Radhika Prasad Dutt*, 14 B. L. R., 185.
 (d) *Basoo Dhul v. Kishen Chunder Geer Gossam*, 12 W. R., 200. See also *Agnatish Dutt v. Doorga Churn Chatterjee*, L. R., 6 I. A., 182.
 (e) *Narayan v. Chintaman*, L. L. R., 5 Bom. 393.
 (f) *Per Sir M. SMITH*, L. E., 2 I. A., 151.
 (g) *Mahesh Chund v. Mirdad Ali*, 5 Sel. Rep., 268; See also *Maharajah Durgadatta Deb v. Ramesh Luchmess Kumbhari*, 15 B. L. E., 176.

The plaintiff sued as the Sobait of a certain idol to re-
Alienation of property in idol's name. cover possession of a zamindari by setting aside an alienation thereof effected by his grandmother, on the ground that it was debutter property dedicated to the idol, and consequently inalienable. It appeared that the property in dispute was purchased by the grandfather of the plaintiff in the name of the idol, which was set up merely for his private worship in his own house without any priests to perform regularly any religious service for the public benefit of Hindus, and that the property had been dealt with all along as his own private property. It was held by the Privy Council affirming the decision of the Calcutta High Court, (i) that this was a mere nominal endowment, and consequently the alienation thereof was not invalid ; and (ii) that a property purchased by a man in the name of his own idol, which no one except himself has the power or right to worship, is not the property of the idol, but the property of the person who purchased it. (h) The Privy Council made the following observations :—“ The idol was not set up for the benefit of public worship. There are no priests appointed, no Brahmins who have any legal interest whatever in the fund. It is not like a temple endowed for the support of Brahmins for the purpose of performing religious service for the benefit of any Hindu who might please to go there. We constantly have suits claiming certain turns of worship, but here there is no turn or right of worship established. There is nothing stated in any way to show that the Mahârâjâ intended that the idol should be kept up for the benefit of his heirs in perpetuity ; and before it can be established that lands have been endowed in perpetuity, so that they can never be sold and must be tied up in perpetuity, some *clear* evidence of an endowment must be given. None of the essentials of an endowment are stated. The Mahârâjâ appears to have purchased the property in the name of the idol, and that is all. Then he deals with the funds of the idol, as if they were his own property. There is no evidence at all of any of the essentials of an endowment in favour of the

(h) *Brojosoondery Debva v. Luchmee Konwaree*, 15 B. L. R. (P. C.) 176 note.

Idol. In the case of *Mahatab Chand v. Mirdad Ali (i)*, which was a very similar case, it was held that, when an endowment is merely nominal, and indications of personal appropriation and exercise of proprietary right are found, a sale of the property is valid under the Hindu law. It appears, therefore, to their Lordships, upon the authority of that case, and upon the principle of endowments, that this was not an endowment by the Mahârâjâ in perpetuity for the benefit of the idol, so as to establish that the property so conveyed to the idol was to be the property of the idol for ever, and that no body could alienate it. Suppose the Mahârâjâ had established the idol in his house, would any body pretend that he could not sell his house? He could sell the house, notwithstanding he had put an idol there. Here there was no endowment, no priest, no public, *no one legally interested in the worship of the idol*, except the Mahârâjâ himself, and nothing to show that the Mahârâjâ intended to establish it for the benefit of his sons or heirs, or any body else, in perpetuity. [The Mahârâjâ having purchased the property in the name of the idol, mortgaged it to one Nundy for a sum of Rs 32, 000 ; and upon his death the property was again mortgaged by his widow to the predecessors-in-title of the defendants to pay off her husband's debts, including the sum due to Nundy. The defendants were in possession under a conveyance from the mortgagees who had foreclosed.]

"In the case of *Gosain v. Gosain (j)* it was held that if a Hindu purchase property in the name of his son, the property is not vested in the son, but remains vested in the father who purchased ; and so with regard to an idol. If a man merely purchases property in the name of his own idol, whom no one except himself has the power or right to worship, the property is not the property of the idol, but the property of the person who purchased it.....Now both the Courts in India have found that there was no real endowment, and their Lordships entirely concur in that finding." (k)

In *Jadubindu Adhikari v. Lokenath Giree* (l) the High Court of Calcutta, upon a review of authorities, laid down the following propositions of law :—

I. That a debutter estate is simply an estate burdened with a trust for the worship of the idol, and not a trust for the family of the grantor.

II. That so far as the grantor of a debutter estate retains any beneficial interest in the property, such interest is just as much capable of alienation by himself, or his heirs, as any other description of property.

III. That where the purposes for which the lands were dedicated are provided for in the assignment thereof, such assignment is valid, although the transaction amounted to champerty. But it has been held by the Privy Council that on the broad principle *delegatus non potest delegare* there can be no assignment of a trusteeship and of trust property for the pecuniary advantage of the trustee, nor could such assignment be validated by any proof of custom, as such custom was bad in law. (m)

A Mohunt in charge of an endowment, with only a life-interest in the property, can not create an interest superior to his own, or, except under the most extraordinary pressure and for the distinct benefit of the endowment, bind his successors in office. If a purchaser from such Mohunt retained possession after the Mohunt's death, the successor to the guddee would have a cause of action against him from the date of the election ; and no length of possession during the vendor's life-time would give the purchaser a valid title as against the new head of the endowment. (n) " If this were not so," said Morris, J., " any Mohunt who was inclined to commit waste on an endowment, and who lived long enough, might ruin the property entrusted to his charge, and leave his

(l) *Per* NORMAN AND BAILEY, JJ, Marshall's Rep, 303—6.

(m) *Rajah Varma Vaha v. Euzi Vurnah Mutla*, L.R., 4 I. A., 76—85.

(n) *Mohunt Birm Suroop Dass v. Khasee Jha*, 20 W. R., 471. See also *Khusai Chand v. Mahadeo Guri*, 12 Bom. 214 ; *post* p. 372.

successor remediless, if more than 12 years had elapsed since the alienations."

The case of a person alienating property which he holds as the *Sebait* of an idol is analogous to that of a Hindu widow alienating ancestral property ; and the question as regards the power of a *Sebait* to grant a *patni* of the *debutter* land, is whether, looking to all the circumstances of the case, the alienation was a prudent and wise act in respect of the purposes for which he was *Sebait* ; and in estimating the validity of a purchase of the *patni* rights, it ought to be considered whether the purchasers satisfied themselves as far as they could that there was a fair and sufficient ground of necessity for the alienation (o)

A grant to a *Gosvami* and his disciples in perpetual suc-
Grant to a cession, coupled with directions which practi-
Gosvami and his cally make it an endowment of a *math* with a
disciples particular line of celebrants of the worship therein, does not entitle an individual *Gosvami* to incumber the endowment beyond his lifetime (p). "A grant to a *Gosvami* and his disciples," said the Bombay High Court, "is intended by a Hindu grantor to be a perpetual fountain of merit producing benefit to himself, and this intention would be entirely defeated by the diversion of the gift at the will of any unprincipled successor of the original grantee to purely secular uses. In the particular case before us, the *Gosvamis* are the ministers of a *math*, and the Peshwa in making the grant enjoined on the grantee, in words sufficient to constitute a trust, the celebration of worship to the goddess "Shree—," the recitation of prayers, and the entertainment of the poor. Such objects, however some of them might, according to English notions, be deemed superstitious uses, are allowable and commendable according to Hindu law. Even of the property belonging to a family, it is prescribed by *Katyayana* (q) that any portion once assigned for purposes of religion shall be excepted from partition so as to be kept available

(o) *Madhoo Buttoyal v. Rajah Bhadro Narain Roy*, 12 W. R., 299.

(p) *Shankar Chait v. Mahadeo Giri*, 12 Bom. H. C. R., 214.

(q) *Yam. Smriti* Ch. XXIV, § 33.

for its intended object. In Bengal it has been held that a Mohunt in charge of an endowment cannot, except distinctly for its benefit, incumber it beyond his own life, (r) and we think that the case of the *Gosvâmis* holding under the grant we are now considering falls within the same principle.....This being so, an individual *Gosvâmi*, was in our opinion no more at liberty to sell the endowment than a *watandur* the endowment of his office."

A Hindu widow, together with the next heir, joined in assigning to the defendant a debutter estate, in consideration of the defendant conducting, at his own cost, proceedings for the ejection of Brahmins and Banians then in occupation as Pujaris to conduct the worship of the idol; and upon the condition that he should thereafter conduct such worship, and out of the proceeds and offerings, retain three-fourths for his own purposes, and for hospitality to pilgrims and strangers, and pay the remaining fourth for the maintenance of the widow and the heir: *Held* that the assignment was valid, the purpose for which the lands were dedicated being provided for, and that although the transaction amounted to champerty, that was no ground for treating it as invalid. An assignment between Hindus of property the subject matter of litigation, on conditions which constitute champerty, is not on that ground invalid. (s)

A plaintiff who seeks to set aside an alienation of lands on the ground that they are debutter i. e., dedicated in perpetuity to support the worship of an idol, must give strong and clear evidence of the endowment. The mere fact that the rents of a particular mahal have been applied for a considerable period to the worship of an idol, is not sufficient proof that the mahal is debutter.

The *Sebait* or manager of a debutter estate has authority, where the purposes of the endowment require it, to raise money by alienating a part of the

(r) *Mohunt B. Suroop Doss v. Khasee Jha*, 12 W. R., 471; ante p. 371.
(s) *Jadubindu Adhikari v. Loke Nath Geree*, Marsh., 303.

estate, his position being analogous to that of a manager of an infant heir under the Hindu law.

The written conveyance of certain lands stated them to be debutter and to be alienated to raise money to repair the temple of the idol. In a suit to set aside the alienation, it appeared that, at the time of the transaction, the temple required repairs, but that the vendor had not applied the whole of the purchase-money to that purpose. There being no evidence of any collusion on the part of the purchaser, or that he was aware at the time of the purchase that the money was to be applied otherwise than the conveyance expressed, *held* that the sale was valid.

Even if it had appeared that the purchaser had notice that the whole of the purchase-money was not required for the purposes of the endowment, but that part of it was to be expended on other objects, an action would not lie to set aside the sale altogether, since the purchaser would be entitled to be reimbursed so much of the money as had been legitimately advanced. (t)

A person who succeeds his father as *Sebait* or trustee of *Fraud by a debutter* lands, is not bound by any acts of his father as *sebait*. father done in fraud of the trust. Mr. Justice Kemp in passing the judgment of the Court observed:—"It appears that the *whole* of the property was endowed property. It is not, therefore, such a property as the plaintiff's father could sell burdened with a trust. It is resumed rent-free debutter lands—lands endowed and the proceeds of which are appropriated to the service of the idol. The plaintiff succeeds his father as trustee of that property, and he is not in any way bound by any acts of his father done in fraud of the trust." (u)

Where land is dedicated to the religious services of an idol, the rent of the land constitute in legal contemplation the property of the idol; and the *Creation of leases or derivative tenures by a sebait.* Sebait has not the legal property, but only the title of manager of a religious endowment. In the exercise of that office she cannot alienate the property, though she may

Surgenath Roy v. Ram Chander Sen, I. L. R. 2 Cal 341.
Surgenath Roy v. Ram Chander Sen, I. L. R. 2 Cal 341.
 W. R. 111.

create proper derivative tenures and estates conformable to usage. To create a new and fixed rent for all time, though adequate at the time, in lieu of giving the endowment the benefit of an augmentation of a variable rent from time to time, would be a breach of duty in a Sebait, and is not therefore presumable. (v) The grant of a patni tenure by a Sebait may be valid, if made under special circumstances of necessity ; w) but it is very questionable whether specific performance of an agreement to grant such a permanent interest in land can be enforced against a Sebait or other manager of endowed property. (x) As a rule, therefore, the Sebait of a religious endowment is competent to lease the endowed lands to the best advantage and to appropriate the proceeds thereof for the purpose of keeping up the worship of the idol. (y) "Indeed, without leasing out the lands," said Mr. Justice Kemp in a case where the lessee had been ousted by his lessor Sebait, "it would be impossible to provide for the expenses of that worship and to carry out the object for which the lands were endowed. Therefore, there being no allegation that the jumma at which the lands have been let by the defendant (lessor) is an inadequate or improper jumma, we must hold that the plaintiff (lessee) is entitled to hold possession under that lease during the life-time of, or during such period as the defendant shall continue to be the Sebait of these endowed lands, as the pottah no doubt is binding on the defendant."

The representatives of three out of four Hindus, who

Debutter property must be bona fide dealt with as such and not as private property. were joint Sebaits, managing debutter property, sued to set aside an alienation made by B, the fourth Sebait alone. They did not make B a party to the suit ; nor did the plaintiffs ask the assistance of the Court to make him one, under sec. 73 of Act

(v) *Maharanes Shibessures Debya v. Mathorawath Acharje*, 13 M. L. A., 270 ; 13 W. R., (P. O.), 18.

(w) *Tahboonissa Bibee v. Kumar Shamkisho e Roy*, 15 W. R., 228.

(x) *Motee Dass v. Madhoo Sudan Ohodhery*, 1 W. R., 4. See also The Specific Relief Act, (I of 1871) sec. 21, cl. (b)

(y) *Airum Misser v. Juggernath Indranwami*, 18 W. R., 439—40,

VIII of 1859. It was decided by the Privy Council that B was a necessary party for he was a member of the body of Sebait and ought to be on the record as a defendant in his personal capacity, and answerable for the costs of the proceedings arising out of his alleged misconduct. (2) "As it is," observed the High Court of Calcutta, "B has been allowed to make away with the endowed property, appropriate the value of it, and then to be a *substantial* though *unseen* co-plaintiff in recovering it from the purchaser." Sir Richard Couch in delivering the judgment of the Judicial Committee in the case affirmed the decree of the High Court upon the following grounds:—"That motives for keeping B out of the suit existed may be seen from the nature of the previous transactions. He is said in the plaint to have been put in possession of Keshabpur by M who was at that time the Sebait; but it would seem, from the case made in the former suit that though the deed of partition was discredited in the former appeal, (a) it was under colour of some deed of partition executed between the members of the family that B obtained the possession of Keshabpur as early as 1841, and so through the act of the very persons who are plaintiffs in the present suit. Having thus obtained possession he subsequently made a conveyance to Anand Gopal, his nephew, on the 17th of September 1861. Whether this conveyance was only a *benâmi* transaction and B continued to be still the owner of the property or whether which is possible, B sold it for a sum much under its value as an advancement to or in order to benefit his nephew, is not clear; nor is it necessary now to say which was the real nature of the transaction. There is evidence that Anand Gopal exercised acts of ownership, that he made leases of and received rent for some portions of the property and that he was apparently the owner of it. Being apparently the owner, he, on the 8th of March 1869, sold a moiety to some of the defendants for Rs. 5,200, and the other moiety to the other defendants

Salandra Nath Dutt v. Shaikh Mahomed Lal, I. L. R., 8 Cal., 42.
S. C. R., 31 A., 135-42.

on the 15th of July 1871, for Rs. 6,000. It is clear, and is not disputed, that these prices represented the full value of the property. The defendants gave the full value and held the property for some time. Then came the appointment of Sebait on the 22nd of August 1873, of the whole family, including B, by virtue of which this suit is brought. Now the defendants having paid the full value to Anund Gopal, and there being this case with regard to B whose acts could not have been unknown to the plaintiffs when they appointed him joint Sebait, that he had parted with the property which was debutter, and through his conduct in so parting with it, it had come to be sold to the defendants. The plaintiffs, the other members of the family, seek to set aside the transaction, to recover back the property, it is true as debutter, but under circumstances which raise a considerable suspicion whether the object is to treat it when it is recovered as debutter, or to have the benefit of it for themselves. The whole transaction seems to be of such a character, that, if there is a case in which it is just and proper to give effect to the general rule that all the parties interested in the subject matter of a suit should be joined in it, this appears to their Lordships to be one."

An assignment from the persons known as the urallars of the *Tracharamana* pagoda and its subordinate chetroms to the Appellant of the uraima right, or right of management thereof, was held to be beyond the legal competence of the urallars, both under the common law of India and the usage of the foundation. (b)

A purchaser for valuable consideration without, as alleged, notice, of lands being dedicated to the religious services of an idol was held affected by notice of the trust, his title being derivable through the deed of dedication and the old *Sebau* title being registered in the Collector's Registry, and it was further held that the *onus* of proving his title as purchaser exempt from such

(b) *Rajah Varmah Vairia v. Ravi Varmah Muika*, L. R., 4 L. A., 75.

trust was on him. "*It lay on him to show some subsequent legal conversion of the lands to the ordinary uses of property.*" (c)

The property of a temple cannot be sold away from the temple; but there is no objection to the sale of the right, title and interest of a servant of the temple in the land belonging to the temple which he holds as remuneration for his service; the interest sold being subject in the hands of the alienee to determination by the death of the original holder, or by his removal from his office on account of his failure to perform the service for which the land was held. (d)

The respondent, on the 27th of February, 1852, and the 25th of July, 1854, obtained two decrees against the Sebait of an idol upon his bonds for the repayment of moneys alleged therein to have been borrowed for the service of the idol and the expenses of the temple. Both decrees directed that the debt should be paid by the Sebait personally, or else realized from the profits of the debutter lands. In a suit by the Appellants as Sebait in succession to the judgment-debtor to set aside the said decrees, and to have the debutter property released from attachment issued in execution thereof: *Held*, that the decrees, being untainted by fraud or collusion, and having been passed after the necessary and proper issues had been raised and determined, are entitled to the force due to judgments of competent Courts, and are binding on the succeeding Sebait, who form a continuing representation of the idol's property. (e) Their Lordships of the Privy Council observed:—Notwithstanding that property devoted to religious purposes is, as a rule, inalienable, it is, in their Lordships' opinion, competent for the Sebait of property dedicated to the worship of an idol, in the capacity as Sebait and manager of the estate, to incur debts and borrow money for the proper expenses of keeping up the religious worship, repairing the temples or other possessions of the idol, [restoring the image of the

(c) *Jagat Mohini Dosses v. Mt. Sakheemoney Dosses*, 14 M. I. A. 289. S. O. 11, 12, 13, 14; 10 B. L. R., 19.

(d) *Govind v. Wagle*, 1 L. R., 5 Bom., 596.

(e) *P. S. v. Dosses v. Govind Chand Bhaboo*, 1 L. R., 2 I. A., 145.

idol, (f)] defending hostile litigious attacks, and other like objects. The power, however, to incur such debts must be measured by the existing necessity for incurring them. The authority of the Sebait of an idol's estate would appear to be in this respect analogous to that of the manager for an infant heir, which was defined in a judgment of this Committee delivered by Lord Justice Knight Bruce.*

"It is only in an ideal sense that property can be said to belong to an idol; and the possession and management of it must, in the nature of things, be entrusted to some person as Sebait, or manager. It would seem to follow, that the person so entrusted must of necessity be empowered to do whatever may be required for the service of the idol, and for the benefit and preservation of its property, at least to as great a degree as the manager of an infant heir. If this were not so, the estate of the idol might be destroyed or wasted, and its worship discontinued, for want of the necessary funds to preserve and maintain them."

Where a Muhammadan widow of the Shiah sect, executed a *towliatnâmâh* with a view to perpetuate certain ceremonies in commemoration of her mother's death, involving the recital of prayers in her own *Imâmbârâ*, and the expenses of first ten days of the *Mohurru*m, it was held that the endowment was not

* "The power of the manager for an infant heir to charge an estate not his own, is under the Hindu law, a limited and qualified power. It can only be exercised rightly in a case of need or for the benefit of the estate. But where, in the particular instance, the charge is one that a prudent owner would make in order to benefit the estate, the *bond fide* lender is not affected by the precedent mismanagement of the estate. The actual pressure on the estate, the danger to be averted, or the benefit to be conferred upon it, in the particular instance, is the thing to be regarded. But, of course, if that danger arises or has arisen from any misconduct to which the lender is or has been a party, he cannot take advantage of his own wrong to support a charge in his own favour against the heir, grounded on a necessity which his own wrong has helped to cause. Therefore, the lender in this case, unless he has shewn to have acted *malâ fide*, will not be affected, though it be shewn that with better management the estate might have been kept free from debt." *Hunooman Persaud Panday v. Mt. Babooe Munraj Koonweree*, 6 M. I. A., 243.

(f) *Tayubnissa Bibi v. Kunwar Sham Kishore Roy*, 7 B. L. R., 621.

of a public character coming under the provision of Act XX of 1863, the widow having continued to deal with it as absolute owner. (g)

According to Muhammadan law, *waqf* or endowed property *Waqf* property is not alienable nor can it be sold in satisfaction of a claim against the estate of the endower. (h)

Waqf property is not the less *waqf* property, because of the use of the words *inām* and *altamgha* in the grant, provided the grant clearly appears to have been intended for charitable purposes. A mutwallee or superintendent of an endowment is not barred by limitation, if he sues to recover possession of endowed property within 12 years from the date of his appointment.

The general principle of Muhammadan law being that *Waqf* or property dedicated to god is inalienable, the trustees of an endowment, cannot create a valid *maurusi* tenure at a fixed rent by granting a lease of any portion of the *Waqf* property (i). Where the whole of the profits of land are not devoted to religious purposes, but the land is a heritable property burdened with a trust,—for example, the keeping up of a saint's tomb,—it may be alienated subject to the trust. (j)

In dealing with the mutwalli of an endowment, it is not necessary for the purchaser to look further than to the power of the mutwalli under his deed of trust. If the deed gives him power and discretion to make a sale, it is not a matter of concern to the purchaser whether that power or discretion is judiciously exercised or not. (k)

A khadim of an endowment having only a life-interest in a portion of such property for his services to a Dargāh, cannot give a lease of such portion extending beyond his life-time without the consent of the succeeding khadim, or perhaps of the mutwalli, if he has any special right to confirm lease. (l)

(g) *Delrus Banoo Begum v. Kasee Abdoor Rahman*, 23 W. R., 453; 15 B. L. 167. [F. C., 3.]

(h) *Wahid Dass Sahas v. Shah Kabirbrodeen*, 2 M. I. A. 390; 6 W. R. 158.

(i) *Shah Ali v. Zameerbrodeen*, 5 W. R., 158.

(j) *Shah Ali v. Shereef Ali*, 10 W. R., 299.

(k) *Shah Ali v. M. S. Sahas*, W. R., 1804, 242.

(l) *Shah Ali v. Zameerbrodeen*, 2 W. R., 162.

CHAPTER VI.

OF PURCHASES BY FIDUCIARIES.

Persons standing in a fiduciary character such as trustees, assignees in insolvency, committees of lunatics, executors and other persons occupying a fiduciary position with reference to the property, or affairs of another inconsistent with the duties or interests of a purchaser, cannot themselves purchase the property with which they are thus connected or entrusted. The same person cannot be both buyer and seller. He who undertakes to act for another in any matter, shall not in the same matter act for himself (*m*)

Where there is a question as to the good faith of a transaction between parties, one of whom stands to the other in a position of active confidence, the burden of proving the good faith of the transaction is on the party who is in a position of active confidence. (*n*) The *onus probandi* is always in such cases on the vendee or grantee, or those claiming under him. Where the good faith of a sale by a son just come of age to a father, is in question in a suit brought by the son, the burden of proving the good faith of the transaction is on the father. (*o*) In judging of the validity of transactions between persons standing in a confidential relation to each other, the material point to be considered is, whether the person conferring a benefit on the other, had *competent and independent advice*. The age or capacity of the person conferring the benefit, and the nature of the benefit, are of but little importance in such cases; they are important only where no such confidential

(*m*) *Per Lord LOUGHBOROUGH, L. C., Whitchote v Lawrence*, 3 Ves., 750. See also Agnew's Law of Trust in British India, pp 256—57.

(*n*) Act I of 1872, The Indian Evidence Act, see lli.

(*o*) *Ibid*, Illustration (*b*).

relation exists. Where a confidential relation is established, the court will presume its continuance, unless there is distinct evidence of its determination. The Court will not undo a trifling benefit conferred by one person on another, standing in a confidential position to him, unless there be *malâ fides*. (p)

A, a partner, buys land in his own name with funds belonging to the partnership. A holds such land for the benefit of the partnership. (q)

(A).—PURCHASE BY TRUSTEES.

It is a well-known maxim of equity that a trustee shall not profit by his trust. If he does make a profit of his trusteeship, it shall enure to the benefit of his *cestui que trust*, for whom he in equity becomes a constructive trustee of that profit.

A trustee, therefore, who is entitled to sell and manage for others undertakes, the moment he becomes such a trustee, not to manage for the benefit and advantage of himself, and the law supposes him to have acquired all the knowledge, a trustee may acquire which may be useful to him. (r)

A trustee-for-sale cannot buy from himself. The sale is not void *ab initio*, but voidable as a matter of course, by the *cestui que trust*, provided he applies to the court for that purpose within a reasonable time and without any acquiescence or unaccountable delay. [The Indian Trusts Act embodies these principles of law.*] But a fair and honest purchase from *cestui que trust* by a bare, nominal or disclaiming trustee is good and not liable to be impeached, for there is no conflict of duty and interest in such a trustee. (s)

* SECTIONS 52 & 53, ACT II OF 1882.

52. No trustee whose duty it is to sell trust-property, and no agent employed by such trustee for the purpose of the sale, may, directly or indirectly, buy the same or any interest therein, on his own account or as agent for a third person.

(p) *Rhodes v. Bate*, L. R., 1 Ch. 252.

(q) Indian Trusts Act (II of 1882), sec. 88, illus. (d).

(r) *Per Lord Eldon*, in *Ex parte Lacey*, 6 Ves., 627.

(s) *Parke v. White*, 6 Ves., 277; *Knight v. Majoribanks*, 2 Mac. & Gerd. 10.

The rule, that a trustee cannot purchase, applies only, where the trustee purchases for his own benefit (*t*). If he purchases for the benefit of his *cestui que trustent*, and they repudiate the transaction, and it subsequently turns out to be profitable, they can not claim the benefit (*u*).

So strongly do Courts of equity object to allowing a trustee to make any profit out of the trust-estate, that it has been held that a *cestui que trust* can not give a benefit to his trustee. (*v*).

It is also a rule of law that a trustee may not purchase for a third person. "One of the reasons for setting aside such transactions," observed the Privy Council in *Mukerjee v. Mukerjee*, (*w*) "is, that the purchaser is presumed from his position to have better means than the vendor has, of ascertaining the value of the property purchased. Well, then, if a person knowing that another holds a fiduciary position and has a better knowledge of the value than the vendor, employs that person to purchase for him, and the trustee purchases secretly in his own name for the benefit of that other, it appears to their Lordships that the sale is equally invalid against the person for whose benefit it is purchased by the trustee as it would be against the trustee himself."

The court will not ordinarily, where the *cestui que trustent* Leave to bid. are *sui juris*, give the trustee leave to bid at a

53. No trustee, and no person who has recently ceased to be a trustee, may, without the permission of a principal Civil Court of original jurisdiction, buy or become mortgagee or lessee of the trust-property or any part thereof; and such permission shall not be given unless the proposed purchase, mortgage or lease is manifestly for the advantage of the beneficiary.

And no trustee whose duty it is to buy or to obtain a mortgage or lease of particular property for the beneficiary may buy it, or any part thereof, or obtain a mortgage or lease of it or any part thereof, for himself.

- (t) Agnew's Law of Trusts in British India, 252. [Bom., O. C., 35.
 (u) *Barwell v. Barwell*, 34 Beav, 371; *Rajabai v. Ismail Ahmed*, 7
 (v) *Vaughton v. Noble*, 30 Beav., 39
 (w) L. R., 2 I. A. at p. 24; 14 B. L. R., 283, 23 W. B., 6.

sale by auction. The reason why a trustee is not allowed to bid is, that he must have acquired especial knowledge, and the court could not feel sure that he would do his duty and communicate this knowledge so as to raise price, if he had a chance of stepping in as a purchaser. (x)

The general rule that a trustee shall not purchase trust-property applies to agents, executors and administrators. Any one of these cannot be permitted, either directly or indirectly, to be the purchaser of any part of the assets of his principal, testator or intestate, but will be considered as a trustee for the persons interested, and must account to them for the utmost extent of the profit made by him. (y)

A purchase by a trustee-for-sale from his *cestui que trust*, although he may have given an adequate price and gained no advantage, shall be set aside at the option of the *cestui que trust*, unless the connection between them most satisfactorily appears to have been dissolved, and unless all knowledge of the value of the property acquired by the trustee has been communicated to his *cestui que trust*. (z) "This principle," said Lord Eldon, "is founded upon this : that though you may see in a particular case that the trustee has not made advantage, it is utterly impossible to examine upon satisfactory evidence, in the power of the Court (by which I mean in the power of the parties), in ninety-nine cases out of a hundred, whether he has made advantage or not. Suppose a trustee buys any estate, and, by the knowledge acquired in that character, discovers a valuable coal-mine under it, and, locking that up in his own breast, enters into a contract with the *cestui que trust*; if he chooses to deny it, how can the Court try that against that denial? The probability is that, a trustee who has once conceived such a purpose will never disclose it, and the *cestui que trust* will be effectually defrauded." (a) The policy of the rule is to shut the door against temptation.

(x) Agnew's Law of Trusts in British India, p. 264.

(y) *Hall v. Hallet*, 1 Cox, 184.

(z) *Ear v. Mackreth*, Wb. Tud. L. C. Eq., 156.

(a) *Ex parte Lacey*, 6 Ves. 627; *Ex parte James*, 8 Ves., 348.

A trustee may buy from the *cestui que trust* provided there is a distinct and clear contract, ascertained to be such after a jealous and scrupulous examination of all the circumstances, that the *cestui que trust* intended the trustee should buy; and there is no fraud, no concealment, no advantage taken by the trustee, of information acquired by him in the character of trustee. In order that a purchase by a trustee from the *cestui que trust* may be sustained, the latter must, of course, be *sui juris*. He must also be "placed in circumstances to make that contract." (b) He must have competent and independent advice, and there must be a full disclosure to him of the real value of the property. (c)

The same principles apply in the case of solicitors, partners, agents, auctioneers, and other persons filling a position of trust. "The rule of the Court," said Sir E. Sugden, "does not prevent an agent from purchasing from his principal, but only requires that he shall deal with him at arm's length, and after a full disclosure of all that he knows with respect to the property." (d)

If a trustee has employed the trust-money, together with his own money, in the purchase of an estate, the *cestui que trust* will have a lien over the purchased estate for the whole amount of the fund misapplied, though no particular part of the estate was purchased with the trust-money only. (e)

In the case of *Fox v. Mackreth* (f) the defendant Mackreth, being a trustee for the plaintiff Fox of certain property, agreed to buy such property of him for a sum of £39,500, and such agreement was duly carried out by conveyances being subsequently executed. Mackreth immediately afterwards sold the property to a Mr. Page for £50,500, and the plaintiff discovering this, filed his bill to have advantage of it. *Decided*:—that Mackreth having purchased the estate from his *cestui que trust* while the relation of trustee and *cestui que trust* continued to

(b) *Per* LORD ELDON, in *Coles v. Trecothick*, 9 Ves 234.

(c) The Transfer of Property Act (IV. of 1882), sec. 55, para. (5) cl. (a).

(d) *Murphy v. Oshea*, 2 J & L, 425.

(e) *Nogender C. Ghose v. Greender C. Ghose*, Boul, 389. See also *Illus. (b)* to sec. 63, Act II of 1882. [sec 88, Act II of 1882.

(f) *Per* LORD TURLLOW, 1 Lead Cas. Eq., 115; 2 Cox. 320. See also

subsist between them, and without having communicated to the plaintiff the value of the estate acquired by him as trustee, he must be and was declared a constructive trustee as to the sums produced by the sale to Mr. Page.

T, a young man aged twenty-three, entitled to a moiety of freehold estate, the entirety of which brought in about £4,400 a year, being pressed for payment of his college-debts, amounting to about £1,000, and being estranged from his father, wrote to his great-uncle for advice and assistance as to payment of the debts. The uncle deputed the defendant, his nephew, to see T. on the subject. The defendant met T. by appointment, and at this interview T. refused to allow any attempt to compromise the debts, and said he would sell his moiety of the estate, upon which the defendants offered him £7,000 for it, payable by instalments. T. next day accepted the offer. Before an agreement had been signed, the defendant obtained a valuation by a surveyor estimating the value of the mines under the entirety at £20,000. The sale was completed without this valuation having ever been communicated to T. T.'s heir filed a bill to impeach the sale. *Held* (affirming the decree of *Wood, V. C.*), that the defendant had stood in a fiduciary relation to T., which made it his duty to communicate to T. all material information which he acquired affecting the value of the property. and that, as he had not communicated the valuation to T. the transaction must be set aside. (g) If a trustee wrongfully disposes of trust property

Acquisition by trustee of trust property wrongfully converted.

to a *bonâ fide* purchaser for value, and subsequently becomes possessed of the same property, the trust attaches again, however many hands the property may have passed through in the meantime. (h)

An executor or administrator cannot be permitted, either

Executor or Administrator may not purchase assets

immediately or by means of a trustee, to be the purchaser of any parts of the assets of his testator or intestate, but will be considered as a

(g) *Tate v. Williamson*, L. R., 1 Eq. 526; 2 Ch., 55. As to setting aside sales purchased by Trustees, see Act II of 1852, sec. 62.
(h) *See also* 2 Ch. Cas., 124; See also *Agnew's Law of Trusts in British India*, p. 319; sec. 65, Act II of 1852.

trustee for the beneficiaries, and must account to them for the utmost extent of the profit made by him. And the general rule that a trustee shall not purchase trust-property applies to an Executor *de son tort*, or an agent, and to any persons who may stand in a fiduciary position. (i)

If an executor or administrator purchases, either directly or indirectly, any part of the property of the deceased the sale is voidable at the instance of any other person interested in the property sold. (j)

Purchase by
Executor or Ad-
ministrator of
deceased's pro-
perty.

(B).—PURCHASE BY MORTGAGEE.

A mortgagee selling under a power of sale cannot buy from himself. (k) He may, however, purchase from the mortgagor.

As a general rule *most* acquisitions by a mortgagor enure for the benefit of the mortgagee ; and conversely, *many* acquisitions by a mortgagee are, in like manner to be treated as accretions to the mortgaged property, or substitutions for it, and, therefore, subject to redemption. But it cannot be affirmed that *every* purchase by a mortgagee, of a sub-tenure existing at the date of the mortgage, must be taken to have been made for the benefit of the mortgagor so as to enhance the value of the mortgaged property, and make the whole, including the sub-tenure, subject to the right of redemption on equitable terms. It may well be that when the estate mortgaged is a Zamindari in Lower Bengal, out of which a patni-tenure has been granted, or one within the ambit of which there is an ancient makrari istmarari tenure, a mortgagee of the Zamindari, though in possession, might purchase with his own funds and keep alive for his own benefit that patni or makrari. In such cases the mortgagee can hardly be said to have derived from his mortgagor any peculiar means or facilities for making the purchase, which would not be possessed by a stranger, and may therefore

(i) Agnew's Law of Trusts in British India, p. 265

(j) Sec. 270, Act X of 1865 ; also sec. 91, Act V of 1881.

(k) *S. M. Kamini Debi v. Ramlochan Surkar*, 5 B. L. R., at p. 458. 1

be held entitled, equally with a stranger, to make it for his own benefit. (l)

A second mortgagee was entitled, equally with a stranger, to purchase for his own benefit the mortgaged estate when sold under a power of sale contained in the first mortgage. (m)

In a suit (1870) to redeem a usufructuary mortgage, dated 1846, of a tálukdâri interest, with all its incidents, it appeared that most of the villages comprised therein were held by third persons under various birt-tenures, valid and subsisting at the date of the mortgage, but that some of them were, in or before 1849, purchased by the mortgagee, who at the summary settlement after Lord Canning's Proclamation was allowed to engage for all the villages, and to hold them as a táluk, subject to rights of sub-settlement.

It appeared also, according to a settlement circular issued in Oudh on the 29th of January, 1861, that under the nuwabi, birt-tenures were presumably carved out of the tálukdâr's estate; that they were held under him upon terms varying according to the terms of the particular pattah or contract, and possibly according to the custom of a particular district; that they did not necessarily entitle the holders of them to engage directly with the Government for the revenue; that when such direct engagements took place, malikana was payable to the tálukdâr; that they were sometimes resumable, and when resumed, would fall into the parent estate; and that in all cases the relation of superior lord and tenant subsisted between the tálukdâr and the birtias; but that birts still subsisting entitle their holders to sub-settlement under the Oudh Sub-settlement Act, 1866.

It appeared also that the mortgagee, availing himself of his position as tálukdâr under the mortgage, had purchased the birts in question in this suit for an apparently inadequate sum, and had treated them as merged in the táluk, engaging

(l) *See* J. COLVILLE, *Raja Kishendatt Ram v. Raja Muntau Als*
Elk, 1 L. R., 5 Cal., at p. 204; L. R., 6 I. A., at p. 158.
 (m) *Ibid.*, 2 L. R., 5 Cal., at p. 211. See also *ante* pp. 312-19,

for them as *tâlukdâr* and not as *birtia*, and taking no steps to keep them alive as distinct sub-tenures for his own benefit :—*Held*, that, under the peculiar circumstances of the case, the mortgagor was entitled, according to equity and good conscience, and consistently with English law, upon paying the original mortgage-money *plus* the purchase-money of the *birts*, to redeem the estate as now enjoyed by the mortgagee. (n)

“ Upon the evidence in the cause,” said Sir J. Colville, “ it would seem that, in and after the year 1254F. (1847) (probably the first settlement after the execution of the mortgage), the mortgagee was permitted to engage for the whole estate, although some at least of the *birtias* had in former years been allowed to engage for the particular villages comprised in their tenures, directly with the Government, and that he continued so to do up to the time of annexation. The first summary settlement after that event seems, however, in accordance with the policy that then prevailed, to have been made with some at least of the *birtias*, including even those of *Itwa*, who are now said to have previously parted with all their *birt* interests.

“ It has also been proved that, immediately after the execution of the mortgage, the mortgagee attempted to enter into the direct receipt of the collections of all the villages by force of his *tâlukdâri* title, and was only prevented from doing so by the resistance of the *birtias*, and the interposition, with or without jurisdiction, of the officer called the *Nazim*. Here, then, the *tâlukdâr de facto* was in open conflict with tenants of the estate claiming to be *birtias*. There is no proof of any regular trial and determination by a civil court of the disputed right. The *Nazim* may have taken action merely as a matter of police, and to prevent disturbance. Then follow the purchases in 1256F. and 1257F., and the execution of the deeds by virtue of which the *birtias*, for very inconsiderable sums, conveyed their interests in the *birts* in question nominally to *Pande Ramdatt Ram*. There is, however, no evidence of the negotiations which led to these contracts ; nothing which shews

(n) *Raja Kishendatt Ram v. Raja Mumtaz Ali*, L. R., 6 I. A., 145.

upon what basis they proceeded ; how far, in making the purchases, the Pande was acting in the character and using the powers of tâlukdâr, or how far in doing so he was compromising alleged rights which might otherwise have been successfully asserted for the benefit of the estate. *The apparent inadequacy of the consideration-money affords a strong argument for supposing that the transactions may have been in the nature of compromises, which the powers of tâlukdâr were exerted to effect on favourable terms.*

“ Again, what followed on the purchases ? Had they been made by or on behalf of a tâlukdâr holding under an absolute as distinguished from a mortgage-title, the tenures would, as a matter of course, have merged in the tâluk. The mortgagee seems, until the institution of these proceedings, to have treated them as so merged. He is not shewn to have taken any steps to keep them alive, as distinct sub-tenures, for his own benefit. On the contrary, at the time of the first summary settlement after annexation he never sought to engage for these villages as birtias and on the summary settlement after Lord Canning’s Proclamation, he did in fact engage for them as tâlukdâr, and as parcel of the tâluk. His conduct is not surprising. He probably did not contemplate redemption (in this very suit he disputed the right to redeem), and he therefore not unnaturally dealt with the birts as merged in the taluk, thereby enhancing the value of the mortgaged estate, of which he expected to become absolute proprietor.

“ Again, had the mortgagor redeemed before these purchases he would have resumed his position as tâlukdâr, with the means of dealing on favourable terms with birtias who have proved to have been willing to part with their interests for very inconsiderable sums. The mortgagee, taking advantage of his position of tâlukdâr *de facto*, has so acquired the birts and allowed them to merge in the tâluk. To allow him now to revive these birts for his own benefit, with the certainty of ~~large~~ ^{of large} and increased value which the regular settlement will give them, would obviously alter the position of the mortgagor

for the worse, by reducing a redeemable estate *pro tanto* to a mere right to malikânâ, and possibly rendering the tâluk no longer worth redemption..... It seems to their Lordships that, although some of the earlier English cases may have been qualified by more recent decisions, the general principle is still recognised by English law to this extent, viz, that most acquisitions by a mortgagor enure for the benefit of the mortgagee, increasing thereby the value of his security; and that, on the other hand, many acquisitions by the mortgagee are in like manner treated as accretions to the mortgaged property, or substitutions for it, and, therefore, subject to redemption. The law laid down in *Rakestraw v. Brewer* (o) as to the renewal of a term obtained by the mortgagee of the expired term, being, "as coming from the same root," subject to the same equity, has never been impeached. The English case which in its circumstances comes nearest to the present is that of *Doe v. Pott and others*, (p) in which the principle was enforced against a mortgagor. It was there held that if the lord of a manor mortgage it in fee, and afterwards, pending the security, purchase and take surrenders to himself in fee of copy-holds held of the manor, they shall enure to the mortgagee's benefit, and the lord cannot lessen the security by alienating them. It is difficult to see why, as in the case of a renewable lease, the same equity should not attach to the mortgagee, particularly if by reason of his position as mortgagee in possession he has had peculiar facilities for obtaining the surrenders." (q)

(C).—PURCHASE BY GUARDIANS.

A guardian cannot gain advantage by his office. The rule of equity with respect to dealings between guardian and ward is extremely strict, and imposes a general inability on the parties to deal with each other. Transactions are not binding unless the circumstances show the fullest deliberation on the ward's part, and the most abundant good faith—*uberrima fides* in the guardian. (r)

(o) 2 P. Wms., 511.

(p) 2 Doug., 710

(q) L. R., 6 I. A. at pp. 157—60.

(r) *Hatch v. Hatch*, 9 Ves., 292.

Purchases by a guardian from his ward cannot be allowed to stand, even although they may have taken place after the guardianship has come to a close, unless the influence which is presumed to arise from the relation has ceased to exist. The influence may continue to exist for a considerable time after the actual relation has ceased to exist. The influence will indeed be presumed to exist, unless there is a distinct evidence of its determination. (s)

Kent in his well-known work thus lays down the duty and responsibility of a guardian in purchasing immovable property for his ward :-“ The guardian’s trust is one of obligation and duty, and not one of speculation and profit. He can not reap any benefit from the use of the ward’s money. (t) He cannot act for his own benefit in any contract, or purchase, or sale, as to the subject of the trust..... The guardian must not convert the personal estate of the infant into real, or buy land with the infant’s money, without the direction of the Court of Chancery. The power resides in that Court to change the property of infants from real into personal, and from personal into real, whenever it appears to be manifestly for the infant’s benefit. It is said that the latter power may be exercised by a guardian or trustee, in a clear and strong case, without the previous order of a Court of equity ; but the infant, when he arrives at full age, will be entitled, at his election, to take the land or the money with interest ; and if he elects the latter, Chancery will take care that justice be done, by considering the ward as trustee for the guardian of the lands standing in his name, and will direct the ward to convey.” (u)

A, a guardian, buys up for himself incumbrances on his ward B’s estate at an under-value. A holds for the benefit of B the incumbrances so bought, and can only charge him with what he has actually paid. (v)

(s) *Keir on Fraud*, p. 127.

(t) *See* *Illus.* (q) sec. 63, *Indian Trusts Act* (II of 1882).

(u) *See* *Keir on Fraud*, 10th Ed., Vol. II, 247, 249.

(v) *See* *Indian Trusts Act* (II of 1882), sec. 28, *Illus.* (A).

(D.)—PURCHASE BY AGENTS.

Where a man employs another as his agent, it is on the faith that such agent will act in the matter purely and disinterestedly for the benefit of his employer, and assuredly not with the notion that the person whose assistance is required as agent has himself in the very transaction an interest directly opposed to that of his principal. (*w*)

Agents, therefore, cannot act so as to bind their principals, where they have an adverse interest in themselves. This rule is founded upon the plain and obvious consideration, that the principal bargains, in the employment, for the exercise of the disinterested skill, diligence, and zeal of the agent, for his own exclusive benefit. It is a confidence necessarily reposed in the agent, that he will act with a sole regard to the interests of his principal, as far as he lawfully may ; and, if impartiality could possibly be presumed on the part of an agent, where his own interests were concerned, that is not what the principal bargains for ; and in many cases, it is the very last thing, which would advance his interests. The seller of an estate must be presumed to be desirous of obtaining as high a price, as can fairly be obtained therefor ; and the purchaser must equally be presumed to desire to buy it for as low a price, as he may. No man

can faithfully serve two masters, whose interests are in conflict. If, then, the seller were permitted, as the agent of another, to become the purchaser, his duty to his principal and his own interest would stand in direct opposition to each other ; and thus a temptation, perhaps, in many cases, too strong for resistance by men of flexible morals, or hackneyed in the common devices of worldly business, would be held out, which would betray them into gross misconduct, and even into crime. It is to interpose a preventive check against such temptations and seductions, that a positive prohibition has been found to be the soundest policy. This doctrine is well settled at law ; but

Agent having an adverse interest, cannot act for his principal.

An agent cannot purchase for himself, at the expense or to the injury of his principal.

(*w*) *Per* LORD LANGDALE, M. R. in *Gillet v. Peppercorne*, 3 Beav., 78.

it is acted upon in Courts of Equity to a much larger extent, not only in cases of persons, confidentially entrusted with the management of the property of others; but in cases of other relations of a confidential nature, involving the rights and interests of the employer. And it is by no means necessary, in cases of this sort, that the agent should have made any advantage by the bargain. Whether he has so, or not, the bargain is equally without any obligation to bind the principal. Of course it is to be understood, as a proper qualification of the doctrine, that *the principal has an election to adopt the act of the agent, or not*; (x) and that if after a full knowledge of all the circumstances, he deliberately and freely ratifies the act of the agent, or acquiesces in it for a great length of time, it will become obligatory upon him; *not* by its own intrinsic force, but from the consideration, that he thereby waives the protection, intended by the law for his own interests, and deals with his agent, as a person, *quoad hoc* discharged of his agency. (y)

Hence it is well settled, as a general rule, that an agent, employed to sell cannot himself become the purchaser; and an agent, employed to buy, cannot himself be the seller. So an agent employed to purchase cannot purchase for himself. So also a trustee cannot ordinarily, become the purchaser of the estate of his *cestui que trust*. For the like reason, an agent of the seller cannot become the agent of the purchaser in the same transaction. So an agent, who discovers a defect in the title of his principal to lands, can not mis-use it to acquire a title for himself, but will be held a trustee for his principal. Indeed it may be laid down as a general principle, that in all cases, where a person is, either actually, or constructively, an agent for other persons, all profits and advantages made by him in the business, beyond his ordinary compensation, are to be for the benefit of his employers. Thus, for example, if an agent, authorized to buy should buy of himself, and the bargain is advantageous to the principal, the

(x) *Lohan Othunder Sing v. Shama Othurn*, W.R., 1864, at p. 2. See also, *Act 12 of 1875*, sec. 198.

(y) *Story on Agency*, 2nd Ed., sec. 210.

latter has his election to ratify it, or not ; if disadvantageous, he may affirm it, or repudiate it, at his pleasure. (z) On the other hand, if the agent makes any profits in the care of his agency by any concealed management, either in buying or selling, or in other transactions on account of his principal, the profits will belong exclusively to the latter. (a)

When mortgaged property is sold at auction subject to the mortgagor's right to redeem, the mortgagor's equities follow the property even when it turns out that the purchaser bought as agent, and not as principal.

Notice to a purchaser's agent is held to be constructive notice to his principal so as to fix the latter with a trust or a burden relative to the subject of purchase which without notice he would have escaped. (b)

If an attorney or agent bid more for an estate than he was empowered to do, he himself would be liable. (c)

If a man send an agent with direct authority and positive directions to bid at an auction and to purchase an estate, and the agent accordingly goes to the auction and bids for the estate which is knocked down to him, but collaterally and in a by-manner enters into a distinct and separate contract with an individual that, in consequence of something to be done or to be foreborne, he will pledge his principal to pay to that individual a certain sum—the principal cannot be bound by this bye-transaction on the part of the agent : for the act of the agent, if effects were given to it, would subject the principal, not only to the contract which he authorized, and which he may be required by the vendor to fulfil, but also to an additional liability which he never contemplated (d)

To make out *prima facie* case of constructive purchase by agent out of the funds of the principal, it must be proved that at the time of the purchase the agent had in his hands funds of the principal sufficient to make the purchase. (e)

(z) See Act IX, of 1872, sec. 215, Illus. (a) & (b).

(a) Story on Agency, 2nd Ed., secs. 211 & 214. See also Act IX of 1872, sec. 215. [399.

(b) *Seedhes Nazir Ali Khan v Rajah Ooodhya Ram Khan*, 8 W. R.,

(c) 10 Ves Jun 400.

(d) *Eshan Chunder Sing v. Samachurn Bhutto*, 6 W. R., P. C., 57.

(e) *Meer Sufdur Ali v. Syud Wulfut Ali*, 3 W. R., 232.

A person's agent for the purchase of an estate is not necessarily his agent to reconvey the same. Thus, where one member of an undivided Hindu family, with the authority of his brothers, purchased a share in certain property, and afterwards (without any authority from them) cancelled the sale, received back the consideration-money, and surrendered the kabalah,—*Held* that the brothers were not estopped from suing the parties in possession of the whole property to set aside what the single brother had done, and to obtain possession of their share in question. (*f*)

If a principal adopts the acts of an agent in respect of the purchase of a property, he must take the property subject to the conditions with which the agent encumbered it, notwithstanding any secret arrangement between himself and his agent not known to third parties : (*g*) for the conditions "form an integral part of the contract itself." (*h*)

If A admits that he made a purchase as agent for B, this admission is evidence against A's heirs and against C who claims through them, to show that the purchase was made by A as *agent* and not on his own account, for A's heirs and their grantee C are precluded from saying that the purchase was made by A for himself and out of his own funds. (*i*)

In cases of purchases of real property by agents or servants the main issue for trial in a suit brought by the ostensible purchaser is whether there was a *bonâ fide* purchase by the plaintiff, or a *benâmi* purchase in his name for the benefit of his principal or master. If the plaintiff was really the rightful purchaser and owner of the property, and the collection of the rents was made by him or by others through him for his own benefit, then he was in point of fact in possession of the property, and the fact of his having collected rents at some time previous to the institution of the suit entitled him to sue for recovery or confirmation of possession. (*j*)

(f) *Bhagwanand Mytes v. Radha Churn Mytes*, 7 W. R., 335

(g) *Laloo Chunder Singh v. Shama Churn*, W. R., 1864, 5. [at p. 58.]

(h) *Laloo Chunder Singh v. Shama Churn Bhutib*, 6 W. R. (P. C.)

(i) *Gowdappa Srinivas v. G. D. Boyd*, 2 W. R., 190—5.

(j) *Kantaram N. N. v. Mahesh Chunder Gupta*, 25 W. R., 168.

(E).—PURCHASE BY A MEMBER OF A JOINT-FAMILY.

A purchase by a member of a Hindu joint-family with joint-funds is a purchase on account of the joint-family, and property so bought may be taken in execution for a joint-family debt. (k)

Where property is purchased by a member of a joint Hindu family, the fact of his living jointly or in commensality with others, affords no presumption as to the source of the purchase-money. (l)

Property, purchased by a member of a joint Hindu family in his own name must, nevertheless, be presumed to have been purchased with money from the family-funds, unless it is shown that the money came from the separate funds of the purchaser. (m)

Under the Mitāksharā purchases made when a family is joint by individual members thereof, are presumably made out of the common funds and for the common benefit. And it is incumbent on any member of the family alleging that a purchase made whilst such family was joint was made out of his separate funds to establish this averment by proof. (n) It has, however, been held that when property has been purchased by an individual member of a joint Hindu family, the burden of proof is on those who claim it to be joint property to show that there was a nucleus of joint-property out of which it could have been purchased. (o) In other words, before it could be presumed from the fact of the members having lived in commensality that the property was purchased from joint-funds, plaintiff was bound to shew that there were joint-funds, or other ancestral property, from which such funds could be derived. The plaintiff in such cases is bound to start his case. (p)

(k) *Bissessur Sahoo v. Maharajah Luchmessur Singh*, L. R., 6 I. A., 233.

(l) *Kisto Chunder Kurmoker v. Raghunath Karmoker*, 10 W. R., 329.

(m) *Rohini Debya v. Digamber Chatterjee*, 23 W. R., 422.

(n) *Hari Singh v. Dabes Singh*, 2 N. W. P., 308; See also *Tarruck Chunder Poddar v. Jodhessur Chunder Koondoo*, 11 B. L. R., 193.

(o) *Dinonath Shaw v. Hurrnaran Shaw*, 12 B. L. R., 349.

(p) *Khetai Chunder Ghose v. Koonj Lal Dhur*, 10 W. R., 333.

Property purchased by a member of a joint-family with money out of the common estate, is family property, even if purchased in the name of his own son. Even if the son is a certified purchaser at a sale under Act I of 1845, the other members of the family are not debarred by s. 21, from claiming a share of the purchase as joint property. (g)

The provisions of Act VIII of 1859, s. 260 (corresponding to s. 317 of Act XIV of 1882) were designed to check the practice of making *benāmi* purchases at execution-sales, i. e. transactions in which one party secretly purchases on his own account in the name of another. But they cannot be taken to affect the rights of members of a joint Hindu family, who by operation of law, and not by virtue of any private agreement or understanding, are entitled to treat as part of their common property an acquisition, howsoever made, by a member of the family in his sole name, *if made by the use of the family funds.* (r)

Immovable property purchased by a Hindu widow with the profits of her husband's estate, there being no proof of any distinct intention on her part to sever such purchases from the estate and appropriate it to herself, was held to form part of her husband's estate. (s)

Where, however, the widow of one of three brothers claimed two-thirds of a dwelling-house which had been the joint family-property of three brothers, on the ground that one-third fell to her as widow of the deceased and mother and guardian of his son, and that she had purchased the other third share from one of the brothers out of her own *stridhan* during the life-time of her husband: *Held* that though it was equally difficult to prove that the purchase-money was her *stridhan*, or that it was the joint property of the three brothers, yet, in the absence of evidence that the

(g) *Bukshu Booneuls Lal v. Bukshu Dewki Nundun Lal*, 19 W. R., 223. See also *Toondun Singh v. Pukhnarain Singh*, 1 L. R., 1 L. A., 342.

(r) *Per* SIR JAMES COLVILLE, *Bodh Singh Doodhooria v. Gurnees*, *Hunder Sen*, 19 W. R., 356 (P. C.).

(s) *Gonda Koor v. Koor Oley Singh*, 14 B. L. R., 152.

brothers had other joint-property from which they derived joint profits, of which the purchase-money could be treated as part, the sale of the second-third share to the widow under a genuine and valid instrument duly conveyed it to her and made it *her* property. (t)

When the members of a Muhammadan family live in community, they do not form a "joint family" in the sense in which that expression is used with regard to Hindus; and in Muhammadan law there is not, as there is in Hindu law, any presumption that the acquisitions of the several members are made for the family jointly. (u) But additions made to the joint-estate by the managing member of a Muhammadan family will be presumed, unless the contrary were shown, to have been made from the joint estate, and will be for the benefit of all the members of the family entitled to share. (v)

It seems, however, upon a preponderance of authorities that in a suit between Muhammadans, for partition, the onus, as a rule, is on those who claim as joint property what stands in the name of an individual co-parcener, "to show that there was a nucleus of joint family property out of which the property in dispute could have been purchased," and that such individual co-parcener had no other independent or possible source of income from which he could make fresh acquisitions of immovable property for himself. The plaintiff must invariably make out a *prima facie* case that the property whereof he claims a share was purchased with joint-funds or out of the rents and profits of family-property.

(F).—PURCHASE BY ATTORNEYS, VAKILS, AND LEGAL ADVISERS.

With a view to provide effectually against the abuse of the professional confidence, the purchase of an estate by an Attorney from his client is treated with severe jealousy by

(t) *Ganesh Janani Debye v. Bireskur Dhol*, 25 W. R., 176.

(u) *Hakim Khan v. Gool Khan*, 1 L. R., 8 Cal., 826.

(v) *Ravuttan v. Ravuttan*, 2 Mad. H. C. Rep., 414; See also *Ludentoo-gissa v. Najad Khatoon*, 2 Cal. L. R., 309.

Courts of Equity. The presumption is *prima facie* so far against its validity, that the burden of proof is thrown on the attorney, to establish its entire good faith for an adequate and fair consideration. In this respect it is said to differ from the case of a pure agency in particular transactions, for in those transactions the purchase of the agent has no validity whatever, independent of the ratification of the principal ; whereas in the case of attorney and client, the purchase is valid, if it can be shown to have been made *uberrima fide*, and without any advantage, taken from professional confidence on one side, or pressing necessity on the other. (*w*)

A solicitor may purchase from his client, but it is essential that the client should be advised by some disinterested solicitor, and it would rest with the solicitor purchasing to prove that he gave an adequate consideration ; and to set aside a sale to a solicitor by his client, the proceedings must be commenced within a reasonable time. (*x*) Unless there is perfect fair dealing, and the dealing is, as it is termed, *at arm's length*, the sale would not be allowed to stand.

Where the good faith of a sale by a client to an attorney, *vakil* or *mukhtâr* is in question in a suit brought by the client, the burden of proving the good faith of the transaction is on such attorney, *vakil* or *mukhtâr*. (*y*)

Although the solicitor in the cause buy in a estate merely to prevent a sale at an undervalue, yet if he act without authority he will not be discharged from his purchase. "It would be a very wholesome rule to lay down," said Lord Eldon, "that the solicitor in the cause should have nothing to do with the sale ; as the certain effect of a bidding by the solicitor in the cause is that the sale is immediately *chilled*." (*z*)

The principle that while the relation of attorney and client subsists in full vigour, the former shall derive no benefit to himself from the contracts or bounty or other negotiations of

(*w*) Story on Agency, 2nd Ed., sec. 212.

(*x*) *Marquis of Olanricarde v. Heming*, 30 Beav., 175.

(*y*) Act I of 1872, sec 111, Ill. (*a*).

(*z*) *Nelthorpe v. Pennymann*, 14 Ves. Jun., 517. See sec. 292, Act XIV

[of 1882.]

the latter applies with equal force to the relation of vakil and client. A suit to recover possession of property, which was purchased by a vakil from his client *benāmi* in the name of another, and which was never made over to that other, cannot be maintained in the name of the ostensible purchaser. Courts should always be careful not to allow such transactions to be enforced in the name of a third person put forward as the real plaintiff. (a)

A contract of sale or conveyance entered into by any one with a person who stands relatively to him in a position of confidence or trust, is liable to be called in question by the vendor, and to be set aside at his instance, if it be found that the other party made an unfair use of his advantages. This rule of Equity applies strongly in a case where any person, acting as an attorney, or as a legal adviser, enters into a contract of purchase with his client in respect of the subject of litigation or advice. Such purchase is liable to be questioned by the vendor at any time, and when it is questioned, every presumption is made against its being just. Undue influence is presumed to have been exerted until the contrary is proved ; and it is incumbent upon the purchaser, if he relies upon the contract, to show that all its terms and conditions are fair, adequate and reasonable. It is enough if it is clear, that the purchaser was so situated in relation to the vendor as to possess all the influence and advantages which belong to the relationship of attorney and client, and which are the foundation of the plaintiff's equity. (b)

A fortiori a conveyance by a native lady to her mukhtār without consideration can not be upheld, for to uphold it would be a denial of justice and contrary to sound policy, even if the grantor as plaintiff sued the mukhtār as defendant to set aside. Still less could it be upheld in a case, where the parties pleading the fraud were defendants and in possession. (c)

(a) *Fusselun Bibi v. Omdah Bibi*, 10 W. R., 469 ; 11 B. L. R., 60 (note).

(b) *Per FEAR AND HOBBHOUSE, J.J.*, in *Fushong v. Munia Halwani*, 1. B. L. R. A. C., 95. See also *Roopnarain Mier v. Kashi Ram*, 2 N. W. P. H. C. Rep., 67.

(c) *Lalla Hures Lall v. Kooldeep Singh*, 19 W. R., 145.

In suit to recover possession, with mesne profits, of property alleged to have been purchased by plaintiff from one A, where defendant U was a daughter of A's sister R, who claimed the property through her son V, the question was whether plaintiff had obtained the property by a valid deed of sale. Plaintiff was a pleader, and, while a suit was in progress in which on behalf of his step-mother, and another client he contended that V had no property at all in the monzah, he obtained a conveyance from A whose sole title was derived from V, which conveyance nominally made to S. T. was never asserted by plaintiff till seven years later when he commenced the suit. The evidence for the payment by plaintiff, of the consideration-money was so unsatisfactory that the High Court summoned the plaintiff and examined him. It was held by the Privy Council (i) that it was somewhat dangerous to allow plaintiff, a professional man, who did not give evidence in his own suit in his own behalf, to be called for the purpose of supporting his case which had broken down; (ii) that plaintiff's evidence as to payment of the consideration-money was very unsatisfactory and at variance with his previous deposition, and that though the mere *factum* of the deed was proved, it was not a *bonâ fide* conveyance; and (iii) that the circumstance of U having in a previous suit admitted the execution of the deed, did not preclude her from contesting its validity and maintaining that it was colourable, not real. (d)

The duty cast upon a solicitor, or other person in a like position of active confidence, who deals on his own account with his client, of disclosing all material circumstances within his knowledge, does not, however, bind him to communicate a "speculative and consequential possibility" which may affect the future value of the subject-matter of the transaction, but which is not more in his knowledge than in the client's. (e)

(d) *Mt. Ushrufoonnessa Begum v. Gridharee Lall*, 19 W. R., 118—19.

(e) *Holman v. Loynes*, 4 DeG. Mac & Gord., 280.

CHAPTER VII.

THE LAW AND CUSTOM OF BENAMI PURCHASE.*

A *benâmi* purchase is "a transaction in which A secretly purchases on his own account in the name of B." (j) It is a common practice in India for fathers and heads of families, among Hindus as well as Muhammadans, to purchase and hold lands in the names of their sons, daughters, wives, and even in the names of their trusty household servants. The fictitious owner is called the *benâmilâr*. The criterion in a *benâmi* purchase, is to know from what source or by whom the purchase-money came or was advanced (g)

This practice of "putting property in a false name," however pernicious it may be, is a part and parcel of the custom of the country, and as such has been repeatedly recognised by the highest judicial tribunal for India—the Privy Council. Mr. Mayne in his well-known treatise on Hindu law says :—"The law of Benâmi is merely a deduction from the well-known principle of Equity, that where there is a purchase by A in the name of B, there is a resulting trust of the whole to A; and where there is a voluntary conveyance by A to B, and no trust is declared, or only a trust as to part, then there is a similar trust in favour of the grantor as to the whole, or as to the residuum, as the case may be, unless it can be made out that an actual gift was intended." (h) But if A has simply lent the pur-

* It is customary in India for the name of the actual purchaser not to appear at all in the deeds, nor is there any document between the nominal and the real purchaser as to the trusts or purposes of the purchase; but possession both of the property and deeds is delivered to the beneficial proprietor, and these are his title. SIR EDWARD HYDE EAST'S Notes of cases, Morley's Digest, Vol. II, at pp. 1—2.

(j) Per SIR JAMES COLVILLE, — *Bodh Sing v. Gunesb Ohunder Sen*, 19 W. R., at p. 358 (P. C.)

(g) *Gossain v. Gossain*, 6 M. L. A., 53; *Syud Uzbur Ali v. Mt. Bebee Ullah Fatima*, 13 M. L. A., 232.

(h) Mayne on Hindu Law & Usage 1st Ed., p. 358; 13 W. R., P. C., 1.

chase-money to B, no trust arises in favour of A ; and none can be implied where the benami purchase is in evasion of the policy of some law or statute.

The trust results to the man who advances the purchase-money, unless such a resulting trust would break in upon the policy of some statute, or unless the purchase be effected by way of gift or advancement to a child, (i) a mistress, (j) or other object of affection or regard.

Resulting trusts will arise, *first*, where the property is purchased in the name of one person, but the purchase-money is paid by another ; *secondly*, where a conveyance is made in trust, declared only as to part, and the residue remains undisposed of, nothing being declared respecting it ; and *thirdly* in cases of fraud. As a resulting trust may be established by parol evidence, it may also be rebutted by the same species of evidence, and therefore parol evidence will be admitted to prove the purchaser's intention, that the person to whom the conveyance was made should take beneficially. (k)

"A mere *benâmi* or *ism-i-farzi* title," said the Privy Council, "is simply a nominal title without interest. It may, or may not, be fraudulent in design. Such a disposition by a grantor, where the transfer of the property, from its very nature, effected a legal transfer of it, would be simply the creation of a trust in his favour, and would, of course, leave the disposition *ab intestato* undisturbed." (l) The *benâmidar* therefore is a person wholly without any interest in the property. There may be a *benâmi* purchase in an idol's name. (m)

But a *benâmidâr* is generally a near relative of the real owner, or an old trusty servant of the family, or a mere *protege* thereof, who has no resources whatever of his own with which to purchase the subject of *benâmi* ownership. "So far," said Mr. Justice D. Mitter, "as the ordinary and usual course of things

(i) *Obhoy Ohurun Mukerjee v. Panchavun Bose*, Marshall's Rep., 564.

(j) *Ram Oomarr Koondoo v. M. O. Queen*, 11 B. L. R., 46 (P. C.)

(k) Taylor on Evidence, 5th Ed., pp. 885—6

(l) *Nawab Umjad Ally Khan v. Mt. Mohumdee Begum*, 11 M. I. A., at p. 446.

(m) *Brjowondari Debya v. Luchun Koonwures*, 20 W. R., 95.

is concerned, the practice of making *benâmi* purchases in the name of female members of joint undivided Hindu families is just as much rife in this country, as that of making such purchases in the names of male members" (n)

In a *benâmi* transaction the party beneficially interested should sue in equity, (o) but the person in whose name a *benâmi* conveyance stands, can maintain ejectment for the premises contained in such conveyance. (p)

The *benâmidâr's* name is simply an *alias* for that of the person beneficially interested. The fact that A has assumed the name of B in order to cheat X, can be no reason whatever, why a Court should assist or permit B to cheat A. But if A requires the help of the Court to get the estate into his own possession, or to get the title into his name, it may be very material to consider whether A has actually cheated X or not. If he has done so by means of his *alias*, then it has ceased to be a mere mask, and fraud has been practiced. The Court may say to A :—"We will not allow you to resume the individuality which you have once cast off in order to defraud others." (q)

Although the habit of holding land *benâmi* is inveterate in India; yet that would not justify the Courts in making every presumption against apparent ownership. (r) This principle has been repeatedly enunciated and affirmed by the Judicial Committee of the Privy Council. In delivering their judgment in the case of *Judunath Bose v. Shumsoonnissa Begum*, (s) their Lordships remarked that suspicions are not proof and that Judges in India are perhaps "too apt to see fraud everywhere"; the habit being superinduced by the manifold cases of fraud with which they have to deal. In determining the right to property seized in execution, the Court must not declare a person claiming as purchaser to be a *benâmidâr* for the debtor upon suspi-

(n) *Chunder Nath v. Kristo Komul*, 15 W. R., 357.

(o) *Maharani Busunt Comeri v. Bullodeb*, 1 Fulton, 383.

(p) See 21 W. R., 257; 28 W. R., 32 (P. C.).

(q) *Mayne on Hindu Law & Usage*, 1st Ed. pp. 362—63. [P. C., 3.

(r) *Bulloor Ruheem v. Shumsoonnissa Begum*, 11 M. I. A., 551; 8 W. R.

(s) *Ibid*, 11 M. I. A., at p. 602. See also *Sreenani Chunder Dey v. Gopal Chunder Chuckerbutty*, 11 M. I. A., p. 28.

cion merely, but its decision must rest upon legal grounds established by legal testimony. (t)

In a case where the question is whether property bought and held in the name of another than the party claiming as the real purchaser, is the property of that other or merely bought and held in his name (*benâmi*) for the claimant, the criterion is to consider from what source the purchase-money came; the presumption is that a purchase made with the money of A in the name of B is for the benefit of A: and when the purchase is by a father, whether Muhammadan or Hindu, in the name of his son, there is no presumption of an advancement in favour of that son. (u)

Where the property was purchased not in the sole name of the son, but in the name of the wife as well as of the son, the Privy Council held that the fact afforded "a strong argument in favour of the hypothesis that it was a *benâmi* purchase, for there was no such community of interest between the wife and the son as would render it probable, that they had been made joint owners of the property; and the reason for putting two names rather than one into a trust applies almost as strongly in India as it would in England." (v)

Where one of two brothers, forming a joint Hindu family, purchases an estate, there being no proof of the purchase-money being no part of the joint property, the true inference may be that the purchase-money was joint property.

In a *benâmi* purchase, the knowledge and assent in whose name the purchase is made, is immaterial, the criterion being the quarter from which the money comes.

Purchase of a *taluk* in Bengal by a Hindu in the name of his eldest son and at that time the only son, held to be a *benâmi* purchase and the son in whose name it was made declared to be a trustee for the father, and *taluk* part of the father's estate. (w)

(t) *Farooq Chowdhry v. Fakhruddin, M. A. Chowdhry*, 9 B. L. R., 456; 11 M. I. A., 234.

(u) *Monroo Syed Azhar Ali v. Mt. Bibi Altaf Fatima*, 4 B. L. R., P. C., 1; 13 M. I. A., 232.

(v) *Ibid.*, 13 M. I. A., at p. 246-48.

(w) *Gossain v. Gossain*, 6 M. I. A., 53, *Bhagbut C. Dey v. Hurq G.*, Pal, 20 W. R., 269.

Benâmi purchases in the names of children, without any intention of advancement being frequent in India, the burden of proof whether what was *prima facie* the nature of the transactions was really not so, is upon those in whose names the purchases were made (x)

Although a purchase by a Muhammadan with his own money of an estate in the name of his son raises a presumption of the son's name being used benâmi for his father, proof that the father's object was to affect the ordinary rule of succession as from him to that property is sufficient to give, as respects strangers, a title to the son independent of and adverse to the father.

Where *bonâ fide* creditors of the ostensible owner of property are claimants on that property, the Court will require strict proof on the part of any one seeking to have it declared that he held it only benâmi. (y)

Benâmi purchases in India, not having been declared by law to be illegal, must be recognised and have effect given to them by the Courts, except so far as positive enactment stands in the way, and directs a contrary course. There is nothing in sec. 260 Act VIII of 1859, either taken by itself, or taken in connection with secs. 259, and 261 to 266, from which an inference can be drawn of an intention to prohibit benâmi transactions. (z)

Their Lordships of the Privy Council in thus laying down the law observed — "It is well-known that benâmi purchases are common in India, and that effect is given to them by the Courts according to the real intention of the parties. The Legislature has not, by any general measure, declared such transactions to be illegal; and therefore they must still be recognised, and effect given to them by the Courts, except so far as positive enactment stands in the way, and directs a contrary course....."

(x) *Gopeekristo Gossain v. Gungapershad Gossain*, 6 M I A., 53.

(y) *Ruknadawla Nawab Ahmed Ali Khan v. Hurdwary Mull*, 13 M. I. A., 395; 5 B. L. B., 578.

(z) *Mt. Bakuns Koonour v. Lalla Buhoree Lall*, 18 W. B., 157. See also 24 W. B., 278; 25 W. B., 493.

“The object which the framers of the Civil Procedure Code probably had in view, was to prevent judgment-debtors becoming secret purchasers at the judicial sales of their property, and to empower the Court selling under a decree to give effect to its own sale, without contention on the ground of benâmi-purchase, by placing the ostensible purchaser in possession of what it had sold, and of insuring respect to that possession by enacting any suit brought against him on the ground of benâmi shall be dismissed.....The Code had certainly not for its object the desire to confer a benefit on fraudulent benâmidârs.

“In the cases where actual possession can be given of the thing sold by the Court, no difficulty can arise ; for there the certified purchaser, having both the certificate and possession, can hold the property by virtue of clause 260, against any suit brought against him ; and if that possession should be interfered with either by force or fraud, on the part of any person, even a benâmi claimant, it no doubt ought, without enquiry as to the benâmi claim, to be restored.

“It has been suggested that difficulties may arise in the case of possession given, under sec. 264, of lands in the occupancy of ryots to a certified purchaser, who had bought benâmi for the judgment-debtor, to whom the ryots may have been afterwards induced to pay their rents. It was said that, upon the strict construction of the Code, the purchaser might be precluded from suing the ryots for these rents. It is not necessary to decide these questions, but their Lordships do not consider this to be a necessary consequence of the construction ; for, as regards the ryots, the certified purchaser when put into possession, becomes their landlord, both by title and possession, and it may well be that they should not be allowed to set up the benâmi right of another against the person to whom they had thus become tenants.”

Section 21, Act I of 1845, does not protect purchases made in the name of third parties from the operation of decrees against the persons beneficially entitled to the purchased property. (a)

(a) *Ameerooniassa Beebee v. Binode Ram Sein*, 2 W. R. , 29.

In *Gnsh Chunder Lahuri v. Mt. Bhuggobutti Dehya*, (b) one of the points raised was whether the lands in dispute were purchased by a Hindu female out of monies constituting her *stridhan* or peculium, or were held by her *benâmi* for her husband, and the Privy Council held that sections 20th and 21st of Act I of 1845 did not raise a presumption of law against a *benâmi* purchase by a Hindu female in trust for her husband.

In *Maharani Basant Kumari v. Bullodeb & another* (c) a bill was filed in the late Supreme Court of Calcutta for an account of the rents and profits of the New China Bazar received by the defendants and their father as the alleged agents of the complainant. The bill stated that the property in question was purchased some years previously for three lakhs of rupees by Rājā Tez Chunder, Rājā of Burdwan, for the complainant, his younger widow, as the *Sehait* trustee of a certain idol and that the rents had been collected by the defendants' father Muddenmohun in his life-time, and after his death by the defendants.

The defendants by their answer admitted the collection of the rents by themselves and their father; but they alleged that they acted as the agents of the Rājā of Burdwan, that the conveyance to the plaintiff was *benâmi*, and that rents have been duly paid into the Rājā's Cutchery and applied to the religious purposes for which they were intended. For the defendants it was proved that Tez Chunder directed the conveyance to be made out in the name of the Rāni, in order to avoid the jurisdiction of the Supreme Court, as far as he was personally concerned, that the defendants had received their appointments from him, and paid the rents all along into his Cutchery, and that the complainant had not asserted any right to interfere in the management and collection of the rents until about two years ago. It was held by Ryan, C. J. that in a *benâmi* transaction the person beneficially interested is alone entitled to sue in equity and to call for an account, and that it being once established that the transaction is *benâmi*, the circumstance of the

(b) 13 M. I. A., 419. See also *Toondan Singh v. Pokhmarain Singh*, L. R., 1 I. A., 342; *ante*, p. 169.

(c) *Fulton's Rep.*, 383.

receipts being in the name of the complainant proved nothing—that being in accordance with benāmi usages.

Where a transaction is once made out to be benāmi, the Courts of India which are bound to decide according to equity and good conscience will deal with it in the same manner as it would be treated by an English Court of Equity. The principle is that effect will be given to the real and not to the nominal title, unless the result of doing so would be to violate the provisions of a statute, or to work a fraud upon innocent persons. For instance, the real may sue the ostensible owner to establish his title, or to recover possession ; (d) and conversely, if the benāmidār attempts to enforce his apparent title against the beneficial owner, the latter may establish the real nature of the transaction by way of defence. (e)

The English doctrine of advancement is applicable in India as between a father and daughter, both of English extraction and living under English law. The *status* of the daughter, under an alleged *bond fide* purchase made by her father for her advancement when a minor, can not be set aside except by positive proof that the father merely made use of her name as he would that of any servant or stranger, retaining the beneficial interest in the property for himself. (f). The onus of proving that a benāmi purchase by a Hindu or Muhammadan father was by way of advancement lies on the party who asserts it. (g) "It has been repeatedly laid down by the Judicial Committee that, when a purchase is made by a Hindu or Muhammadan in the name of his son, the presumption is in favour of its being a benāmi purchase, and it lies on the party in whose name it was purchased to prove that he is solely entitled to the legal and beneficial interest in the estate. It has been also said that when the rights of creditors are in issue very strict proof of the nature of the transaction should be required from the objector to such rights ; for that it would be easy, if such

(d) *Mt. Thukraim Sookraj v. Government*, 14 M. I. A., 112.

(e) *Ramanugra v. Mahasunder*, 12 B. L. R., 433. (P. C.)

(f) *Kishen Koomar Maitro v. M. S. Stevenson*, 2 W. R., 141.

(g) *Nagimbhan v. Abdulla*, I. L. R., 6 Bom., 717.

vigilance and jealousy were not exercised, for a family to place family-property out of the reach of creditors. It is possible that the transaction was a real one, and that the purchase was intended for the benefit of the son: but the burden of proof lies with more than ordinary weight on the person alleging the *bona fides* of such a transaction "

A Hindu had only self-acquired estate. Previous to his death his three sons separated in food, and left their father's house living separately. *Held* that although there was a cesser of commensality, the normal condition of an undivided Hindu family did not, from the evidence, operate as a complete separation; and the property purchased after the separation in the name of one of the sons, and a business carried on in the son's name, declared to be *benâmi*, and that the same and the profits derived from the business formed part of the joint family estate. (h)

B., a Muhammadan married woman, but separated from her husband, contracted an irregular marriage with V., and cohabited with him for many years, until her death. V., during the time he so cohabited with B., purchased an estate, which was registered in his name as the owner. Eleven years after the date of the purchase, B. and V., being then both deceased, a suit was brought by the then *Shajadu Nasheen* to recover the estate bought by V., on the ground that it was purchased by him *benâmi* with moneys which belonged to the *Shajadu Nasheen* or owner of a lay *Imâmbârâh*, or a superintendent of a Muhammadan religious establishment, which he assumed to be. It was held, upon the evidence (i) that it was not a *benâmi* transaction, as the purchase-money was partly V's and partly obtained by gifts from B. to V.; and (ii) that it was not from the proceeds of a misappropriation by her, as trustee of the *Imâmbârâh*, as she was lay proprietor, and had power of disposition, and, therefore, that the doctrine of resulting trusts did not apply. (i). "The very principle of a resulting trust," said Sir M.E. Smith, "is that the property has been purchased with money

(h) *Masummat Anundee Koonwar v. Khedao Lal*, 14 M. I. A., 412.

(i) *Mt. Anseeroomissa Khanum v. Mt. Ashraf Joonnissa*, 14 M. I. A., 433.

belonging to another, with an implied trust that it should belong to that other person to whom the money also belonged. But *if it was the intention of the person to whom the money belonged that there should be no such trust then, of course, no such implied trust could arise*, because it is only a trust by implication, and the presumption would then be met by the facts.....There was no existing Imâmbarâh in the sense of any place of worship which might be said to have its property belonging to it, as distinct from the ownership of the Begum.....She had formed relation with V. as a second husband, although it was not a marriage which was warranted by law, still he lived with her as her husband, and apparently upon very good terms. It was, therefore, extremely natural, if she found that she was in bad health, that she should have been desirous to make some provision for his benefit.”(j)

Where a lease was taken benâmi in the names of three ^{Suit by land-lord against benéficial lessees.} ladies, who for some time paid rent to the lessor, and who were sued for rent by him on several occasions when he obtained decrees, which he executed against their property, the lessor was nevertheless allowed, when the ladies were unable to pay any rent, to sue their husbands, who were the beneficial lessees. (k)

The doctrine of estoppel (l) does not apply to benâmi transactions and in this country a lessee may deny that the person in whose favour he executed a kabuliât was not the real lessor and beneficially entitled to the rent and he may prove by parol evidence that the person who granted the lease was only a benâmidâr for a third party. (m)

The real owner of property may sue the benâmidâr, either ^{Real owner may sue benâmi-dâr.} to declare the title to the property, or to recover possession of it, and may prove the benâmi nature of the transaction. (n) The equitable owner of property which

(j) *Anceromnessa v. Ashruffoonnessa*, 17 W.R., at p. 260.

(k) *Debnath Roy Chowdhury v. Gungadhar Dey*, 18 W.R., 132.

(l) See the Indian Evidence Act, I. of 1872, Sec. 116.

(m) *Donzelle v. Kedar nath Chuckerbutty*, 7 B. L. R., 720.

(n) *Tara Soondari Debi v. Oojulmoney Dasee*, 14 W. R., 111. See also *Mt. Thakrain Soobraj Koorur v. The Government*, 14 M. L. A., 112.

is in the name of a trustee may prove the benâmi nature of the transaction in a suit by the trustee to obtain possession of the property. (o) In many cases the real owner may plead his own fraud. object of a benâmi transaction is avowedly to defraud creditors, and against them it is void. (p) But as between the true owner and the benâmidâr it is now settled law, that the true owner can plead his own fraud. (q)

Where the widow of one of three brothers claimed two thirds of a dwelling house which had been the joint family property of the three brothers, on the ground that one-third fell to her as widow of the deceased and mother and guardian of his son, and that she had purchased the other third share from one of the brothers out of her *stridhan* during the life time of her husband, it was held that though it was equally difficult to prove that the purchase-money was *stridhan*, or that it was the joint of the three brothers, yet in the absence of evidence that the brothers had other joint property from which they derived joint profits, of which the purchase-money was treated as a part, the sale of the second third share to the plaintiff under a genuine valid instrument duly conveyed it to her and made it her property. (r)

In a suit to establish plaintiff's right under a *kabalah* to land attached in execution of a decree against her husband, the question arose whether she was the real purchaser or only a benâmi for her husband. The Lower Appellate Court, supposing that the sale to plaintiff had been made just before the decree was passed, found that the transaction, though *prima facie* a sale to the wife and supported by possession, was one in which there was much suspicion of *mala fides*, and dismissed the suit. It was held by

(o) *Ramanugraha Narain v. Mahasunder Koonnur*, 12 B. L. R., 433.
 (p) *Gunabhai v. Srinivasa*, 4 Mad. H.C., 48; *Tilak Chund v. Jitmal* 10 Bom., 208.

(q) *Chowdhraim v. Debya*, 21 W. R., 422; *Nasik v. Ghose*, 23 W. R., 42; *Sen v. Sikdar*, 24 W. R., 391; *Param Singh v. Lalji mal*, 1 L. R., 1 All, 403.

(r) *Gunesh Junones Debia v. Bressur Dhal*, 25 W. R., 176.

the Calcutta High Court that the Judge committed an error of law in resting its decision upon circumstances of this kind. Sir Richard Couch in delivering judgment in this case observed:—“It is not enough that these should be a mere possible *mala fides*. The Judge ought to find that the transaction was not what appeared to be; that instead of being a purchase by the wife, it was a purchase by the husband in the wife's name.” (c)

A step-son Rājā Chunder nath Roy made over certain properties to his step-mother Rāni Haripriya for her maintenance. Out of the income she enjoyed, she bought immovable property in the names of her nephew Rām Chandra, and her brothers widow Shib Sundari with the express intention at the time, that after her death it should go to her nephew and his mother Shib Sundari respectively. It was held by the Privy Council affirming the decision of the Calcutta High Court that the purchase by the Rāni was not a *benāmi* purchase absolutely for herself, but was a purchase with the intention of benefiting the person in whose name the purchase was made; and their Lordships were of opinion that it would make no difference in point of law whether she did or did not reserve a life-interest and control over the disposition of the proceeds of the property during her life. Their Lordships thus concluded:—“One may observe that, on the evidence it would appear that she during her life-time, did bestow very considerable benefits on both the mother and the boy; so that practically, in all probability she gave them quite as much as the proceeds of the property. Well then, the Court below, not having miscarried in point of law, so far from having miscarried in point of fact, the evidence is very strong indeed that the purchase from the very beginning was made with the intention that the property should not go to her heir-at-law, but should go to Shib Sundari, or if Shib Sundari was dead should go to Rām Chandra. The Rāni used to say that ‘all these properties were Rām Chandra's,’ and her care was that they remain as Rām Chandra's. It is perfectly

Purchase by Hindu widow in the name of nephew or brother's widow.

(c) *Mussamat Meher Banoo v. Keramat Ali*, 22. W. R., 402.

plain that she had purchased them with the original intention of benefiting him, in order that, after her death, they might go to him" (t)

Where a Muhammadan husband was found to have paid

Purchase by a Muhammadan in wife's name. the purchase-money for a patni-tâluk standing in the name of his wife, it was held that his having been in possession of the money was *primâ facie* evidence that the patni-tâluk belonged to himself and not his wife, and that presumption was not rebutted by the fact that he purchased the patni in the name of his wife. (u)

The benâmi purchase of a patni-taluk at a sale for arrears of

Purchase of a Patni by a defaulting co-sharer. rent by one of the defaulters, does not avoid the sale against the Zamindâr, who may, if he pleases, treat it as valid. The only consequence is that the owner who purchases must be considered as trustee for the other owners at the option of the latter; and in that case the property in the tenure remains precisely as it did before the sale. (v).

Where there is a person in possession of an estate other

Duty of a Purchaser from a Benâmidâr. than the nominal owner, *i e*, the person in whose name the title deed is, a purchaser, although he may be a purchaser for value, is bound to inquire what is the nature of his possession. If he does not think to do so, he takes subject to the rights of the person in possession. Couch C. J., observed: "We have here a case where the benâmidârs have no possession, and the property is in the possession of the person for whom they were benâmidârs. In such a case the person purchasing from the benâmidârs was bound to inquire what was the interest of the persons who were in possession. It is question of equity, whether the person buying from the benâmidârs can be considered to have had actual or constructive notice that the benâmidârs were not the real owners,

(t) *Raja Chandra nath Roy v. Ramjay Mazumdar*, 6 B. L. R., (P. C) 303; Pandit's P. C. J., Vol. II., 613.

(u) *Rames Sarnomoyee v. Luckmiput Doogur* 9 W. R. F. B., 338.

(v) *Jotendra Mohan Tagore v. Debendra Monoe* 2 Calc. L. R., 419. See also *Koylash C. Banerjee v. Kales Ptarmico Choudhry* 16 W. R., 80.

and that the purchase was made simply in their names for the other persons.

"It was on this principle that I decided a case, (*w*) where the purchase had been made from the person who was the nominal owner, but it appeared that there was a trust for some charity for the benefit of the Chinese community in Bombay, and there was a possession by persons who were objects of the charity. I held that the purchaser was bound to enquire what the nature of that possession was, and was affected by notice of the trust for the charity. The principle, if a purchaser, although he may be a purchaser for value, has actual or constructive notice of the trust, he is bound by it to the same extent and in the same manner as the person from whom he purchases. And where there is a person in possession of the estate other than the nominal owner, the person in whose name the title-deed is, the purchaser is bound to enquire what is the nature of his possession. If he does not think fit to do so, he takes subject to the rights of the person in possession. That rule must be applied to this case. There may be cases in which a purchase from a benâmidâr would be sufficient and would give a good title, but in such a case as the present, where the defendants were in possession, I think the plaintiff's purchase from the benâmidârs did not give them any title or right to recover the property." (*x*)

It is a principle of natural equity, which must be universally applicable, that where one man allows another to hold himself out as the owner of an estate, and a third person purchases it, for value, from the 'apparent owner in the belief that he is the real owner, the man who so allows the other to hold himself out shall not be permitted to recover upon his secret title, unless he can overthrow that of the purchaser by showing, either that he had direct notice or something which amount to constructive notice of the real title, or that there existed circumstances which ought to have put him upon an enquiry which, if prosecuted, would have led to a discovery of it.

(*w*) *Mancharji Sarabji Challa v. Kongseoo*, 6 Bom., O. C., 59.

(*x*) *Lakeem Meah v. Bejoy Patnè* 22 W. R., 8. See *ante* p. 120.

Without laying down any general rule as to the circumstances which should prompt enquiry in cases of this kind, the Privy Council were of opinion that *the circumstances must be of such a specific character that the Court can place its finger upon them*, and say that upon such facts some particular enquiry ought to have been made. There is nothing in the position of a vendor being a Muhammadan woman living with her children upon the estate, and sometimes letting it out, which should put any one upon enquiry whether she was the real owner or not. It was also held that the mere fact of a man building upon, or spending money to improve, property belonging to the woman with whom he was living, cannot lead to the inference that, contrary to the apparent title, he had purchased the land for himself; and neither this fact, nor the circumstance of the deed of sale from a Muhammadan woman containing the apparently usual clause that she had made the sale with the consent of the family, was sufficient to put the purchaser on enquiry. (y).

To make out a title to property, it is not sufficient that the party from whom, or in whose name the claimant alleges that he bought the property, does not come forward to dispute the allegation. It is necessary for the plaintiff to establish either the alleged benâmi, or a subsequent conveyance from the alleged benâmidâr. Even where a deed or other document is so old that it is not reasonable to expect proof of the *factum* of its execution, its authenticity must be made out in some reasonable way; the usual method being parol testimony as to the facts of its custody. (z)

If it is once established that a transaction is benâmi, the mere fact that the deeds and proceedings involved bear the benâmidâr's name is of no essential weight on the one side or the other of the question, *who is the principal*. (a)

In the case of a benâmi purchase, the mere use of the *farri*

(y) *Ramkumar Koondoo v. McQueen*, 2 B.L.R., 53, (P.C.); 18 W.R., 166.

(z) *Mussamut Fureedoonnissa v. Ramanoogra Singh*, 21 W. R., 19,

(a) *Rohet Lall v. Dindyal Lall*, 21 W. R., 257.

name is sufficiently disposed of, if the party whose name is used sets up no claim, and if there appears to have been long continued possession on the part of person claiming to be the beneficial owner. (b)

Where a purchaser in execution sale of rights and interest, of judgment-debtor, takes property held benâmi by that judgment-debtor without any beneficial interest therein, he has no defence against the claim of the real owner who was in possession up to the date of the sale. (c) The defendant in this case who was the special appellant claimed to hold the land in suit by virtue of a purchase in execution-sale of the rights and interests of the Rajah of Jointeah. The plaintiff alleged that this property was held benâmi for him by the Rajah; that in fact it was his hereditary rent-free tenure, and the Rajah had no beneficial interest whatever in it. The Lower Appellate Court had found as a fact that that Rajah had never been in receipt of the rent of the land, and that it had been in the possession of the plaintiff up to the time of the sale. Under these circumstances, the rule which was laid down by Sir Richard Couch as to the duty of a purchaser having notice of an actual or constructive trust to enquire into the nature of possession of those benâmidârs, or real owners was followed by Mr. Justice Ainslie.

A mortgagee holding two mortgages of the same property, the first being in his wife's name sells the property to the plaintiff in execution of a decree upon his *second* mortgage, and subsequently resells property to his son benâmi for himself in execution of a decree upon his *first* mortgage:

Held in a suit against the mortgagee and the benâmidârs that the plaintiff was entitled to set aside this second sale and to redeem, but that the mortgagor not being a party, the Court was wrong in introducing into the decree a declaration to the effect that the plaintiff was entitled "as second mortgagee" and had not acquired the equity of redemption belonging to

(b) *Per* JACKSON and GLOVER, J. J. in *Mt. Hoymobutty Dass v. Sree Lissen Nundy*, 14 W. R., 58.

(c) *Masum Meah v. Sham Dass*, 22 W. R., 189.

the mortgagor. Such a declaration being quite unnecessary, the plaintiff had a right to complain and get rid of an embarrassing to his title, and should in appeal be struck out at the expense of the defendant-respondent who resisted it. (d)

The real owner of property is the person who should institute suit for it. A benâmi holder may sue as trustee on behalf of the beneficial owner without disclosing the name of the real owner; and if the defendant does not object to the suit proceeding in that form, and raises no issue upon the real title of the plaintiff, the suit may proceed and be decided. (e)

In a mortgage-deed the mortgagee was described as one "M. J. B., otherwise B. K. the Wife of M." and it recited, that the consideration-money was advanced by her. M. J. B. was not the wife of M., but his concubine. In the absence of satisfactory proof that the money advanced was M. J. B.'s separate property, and upon evidence that the consideration-money was really advanced by M.:—Held (affirming the decrees of the Courts in India), that the preponderance of the evidence was in favour of M. being the person who advanced the money, and that the transaction was to be considered as benâmi, or in trust for M. as mortgagee (f).

The fact of possession has been held to prove that the property was purchased on behalf of the possessor. (g).

A defaulter cannot under Regulation VIII of 1819, purchase a patni sold on account of his default to pay the patni-rent, either in his own name or in that of any other person (h).

Parties who choose to buy property in another person's name, and allow that person the opportunity of dealing with it as his own, can not be allowed in equity to intervene in a suit brought by him for the rent of such property. (i)

(d) *Per LORD BLACKBURN in Chooramun Singh v. Shaikh Muhammad Ali his wife and son*, L. B., 9 I. A., 21.

(e) *Poorna Koomar Roy Chowdhery v. Gooloo Churn Sen*, 3 W. R., 159.

(f) *Bhowan Doss v. Shaikh Muhammed Hossein*, 13 M. I. A., 346.

(g) *Syud M. Shumsool Hoda v. Syud Moncerul Hug*, 2 W. R., 41.

(h) *Muza Mohamed Nusseer v. Kishan Goyee*, W. R., F. B., 92.

(i) *William Smith v. Mahum Mahoon* 18 W. R., 526.

CHAPTER VIII

OF CONTRACTS OF SALE.

As soon as the fact is established of the final mutual assent of the parties to certain terms, and those terms are evidenced by any writing signed by the party to be charged or his agent lawfully authorized, there exist all the materials which a Court of Equity requires to make a legally binding contract. (*j*) "If there is a clear valid contract for sale," said Lord Justice Turner in *Hadley v. Bank of Scotland*, (*k*) "the Court will not permit the vendor afterwards to transfer the legal estate to a third person, although such third person would be affected by a *lis pendens*. I think this rule well founded in principle, for the property is, in Equity, transferred to the purchaser by contract, the vendor then becomes a trustee for him, and can not be permitted to deal with the estate so as to inconvenience him." But it was contended in *Shaw v. Foster*, (*l*) that a vendor of an estate is not truly described when he is merely described as a trustee for the vendee and that he has a particular and defined character and his rights and liabilities are restricted. "*The vendor*," said Sir Thomas Plumer, M. R., in *Wall v. Bright*, (*m*) "*is not a mere trustee; he is in progress towards it, and finally becomes such when the money is paid, and when he is bound to convey*. In the meantime he is not bound to convey; there are many uncertain events to happen before it will be known whether he will ever have to convey, and he retains for certain purposes his old dominion over the estate. There are these essential distinctions between a mere trustee and one

(*j*) *Per* LORD WESTBURY in *Chonnock v. Marchioness of Ely*, 4 DeG. J. and Smith, at p. 646. *

(*k*) 3 DeG. J. and Smith, at p. 70.

(*l*) L. R., 5 Eng. and Ir. Ap., at p. 329.

(*m*) 1 Jac. and W., 404—503.

who is made a trustee constructively by having entered into a contract to sell. The principle that the agreement is to be considered as performed, is a fiction of Equity and must not be pursued to its all practical consequences." Under the Transfer of Property Act, 1882, a contract for the sale of immovable property is a contract that a sale of such property *shall* take place on terms settled between the parties. *It does not, of itself, create any interest in or charge on such property.* (u)

In contracts for the sale of estates whether freehold or leasehold, the English law in the absence of an express stipulation to the contrary, implies an undertaking on the part of the vendor that he will make out a good title, and an undertaking on the part of the vendee, that if the title prove defective, the damages to which he shall be entitled, shall be limited to the expenses actually incurred in the investigation, and shall be merely nominal for the loss of the bargain. If, indeed, it should turn out that the vendor has been guilty of any fraudulent misrepresentation or concealment, or that he has contracted to sell an estate in which he has no reasonable ground for believing that he has any interest whatever, then the case will fall within the general rule of law, that where a person makes a contract and afterwards breaks it, he must pay the whole damage sustained by the party with whom he contracts. The same result would also follow—should the question arise on an executed contract, and the indenture contain a covenant for quiet enjoyment. (o)

On an agreement for the sale of immovable property, it is usual for the purchaser to pay down a part of the purchase-money by way of earnest or deposit, which if the purchase go off for want of title, is to be returned to the purchaser with or without interest, in the mean time. The risk of this money falls upon the vendor whilst it remains in his custody, unless it be invested upon some security expressly approved of by the purchaser.

(u) Act IV of 1882, Sec. 54.

(o) Taylor on Evidence, 5th Ed., p. 1015. See also *Dewi Ghela v. Jivaraj Mahandas*, 2 Bom. H. C. Rep, 430.

Every portion of the purchase-money paid in pursuance of a contract for sale, is a part-performance and execution thereof and, to the extent of the purchase-money so paid, does in Equity finally transfer to the purchaser the ownership of a corresponding portion of the estate. (p) This doctrine was approved and adopted by Lord Cairns in *Aberman Iron-works v. Wickens* (q), who declared the purchaser entitled to a lien "by way of encumbrance on a corresponding amount in value of the estate."

If upon a treaty for purchase, one of the parties to the contract makes a representation materially affecting the subject-matter of the contract, he surely can not be heard to say that he knew nothing of the truth or falsehood of that which he represented, and still more surely he can not be allowed to retain any benefit which he has derived, if the representation he has made turns out to be untrue. It would be most dangerous to allow any doubt to be cast upon this doctrine* (r)

In *Hart v. Swaine* (s) the plaintiff bought a property on the faith of the defendant's representation that it was freehold while it was actually copyhold, it was held that the defendant having taken upon himself, with a view of securing a benefit to himself, to assert that the property was freehold, had in the view of a Court of Law committed a fraud. Mr. Justice Fry in delivering his judgment in the case quoted with approval the following dictum of Maul. J. in *Evans v. Edmonds* (t): "I conceive that if a man, having no knowledge whatever

(p) *Per* LORD WESTBURY in *Rose v. Watson*, 10 H. L. C., 672.

(q) L. R. 4 Ch. Ap., 101—110. See also *Kenny v. Admor-General of Bengal*, 3 B. L. R., O. C., 75.

(r) *Per* TURNER, L. J., *Rawlins v. Wickham*, 3 De G. and J., 316—17.

(s) L. R., 7 Ch. D., 42. (t) 13 C. B., 777, 786.

* "The doctrine is found," said Lord Chancellor Campbell in a case in the House of Lords, "in the laws of all civilized nations that, if a man, either by words or conduct, has intimated that he consents to an act which has been done, and that he will offer no opposition to it, although it could not lawfully have been done without his consent, and he thereby induces others to do that from which they might otherwise have abstained, he cannot question the legality of the act which he has so sanctioned, to the prejudice of those who have so given faith to his words, or to the fair inference to be drawn from his conduct." *Cairnes v. Leimer*, 3 Macq., H. L. Cases, 829.

on the subject, takes upon himself to represent a certain state of facts to exist, he does so at his peril ; and, if it be done either with a view to secure some benefit to himself, or to deceive a third person, he is in law guilty of a fraud, for he takes upon himself to warrant his own belief of the truth of that which he so asserts. Although the person making the representation may have no knowledge of its falsehood, the representation may still have been fraudulently made."

An offer to sell property may be withdrawn before acceptance without any formal notice to the person to whom the offer is made. It is sufficient if that person has actual knowledge that the person who made the offer has done some act inconsistent with the continuance of the offer, such as selling the property to a third person. *Seem*, that the sale of the property to a third person would of itself amount to a withdrawal of the offer, even although the person to whom the offer was first made, had no knowledge of the sale. *Seem*, that the acceptance of an offer to sell constitutes a contract for sale only as from the time of the acceptance. The contract does not relate back to the time when the offer was made. The owner of a property signed a document which purported to be an agreement to sell it at a price fixed. But a post-script was added, which he also signed—"This offer to be left over until Friday 9 A.M." It was held that the document amounted only to an offer, which might be withdrawn at any time before acceptance, and that a sale to a third person which came to the knowledge of the person to whom the offer was made was an effectual withdrawal of the offer. (u) Retraction, therefore, need not be express.

Where the vendors of land, in a letter acknowledging the receipt of an offer by intending purchasers, wrote as follows:—"which offer we accept, and now hand you two copies of conditions of sale," and therewith enclosed a formal agreement with conditions of a special character: It was *held*, that the acceptance was only conditional,

(u) *Dickinson v. Dodds*, L. R., 2 Ch. D., 463.

and that there was no final agreement of which specific performance could be enforced as against the purchasers (v)

Where a contract for the purchase of a lease stated that it was made "subject to the approval of the title by the purchaser's solicitor": it was *held* that in the absence of *malu fides* or unreasonableness on the part of the purchaser or his solicitor, the vendor could not enforce specific performance of the contract, if the purchaser's solicitor disapproved of the title. (w). It may be, however, doubted whether the addition, in a written document of the words, "subject to the title being approved by our solicitor," could affect a contract for the sale of land, otherwise complete in itself, and whether the proper meaning of such words is more than that the title offered is not to be accepted without investigation, and that objections made on such investigation would be subject to the decision of a legal tribunal (x)

An agreement for the purchase and sale of certain immovable property provided that the completion of the contract should be "subject to the approval of the purchaser's solicitors, Messrs. Dutt and Mitter," and that if they should not approve of the title, the vendor should refund the earnest-money and pay all costs incurred by the purchaser in investigating the title. The purchaser's solicitors disapproved of the title, and the purchaser rescinded the contract. The agreement was not registered. In a suit to recover the amount of the earnest-money and costs, it was held (i) that, assuming the objections to the title to be reasonable, the purchaser was entitled to rescind the contract; (ii) that the agreement did not require registration, for it was a document entitling the vendee to a future right in immovable property and requiring something to be done thereunder, namely, the payment of the purchase-money on one side and the execution of the conveyance on the other (y).

(v) *Crossley v. Maycock*, L. R., 18 Eq., 180.

(w) *Hudson v. Buck*, L. R., 7 Ch. D., 688. [670; 4 App. Cas., 311.]

(x) *Per* EARL CAIRNS, L. C. in *Hussey v. Horne-Payne* L. R. Ch. D.

(y) *Sree Gopal Mullick v. Ram Churn Nudkar* L. R., 8 Cal., 888.

A contract by means of letters requires two things, namely Contract by an offer and an acceptance. If an offer is clog-
Letters. ged with a particular condition, and an answer is returned accepting the offer but rejecting the condition, that alone will not form a contract, or if an offer be made and an answer is returned accepting the offer, under certain conditions that alone is not a contract, although in both cases it would be so, if a third letter was sent simply accepting the offer. ("The answer," said Lord St. Leonards, "must be a simple acceptance without any new stipulation or any exception." Under the Indian Contract Act the acceptance must be (1) absolute and unqualified; and (2) be expressed in some usual and reasonable manner, unless the offer or proposal prescribes the manner in which it is to be accepted. If the proposal prescribes a manner in which it is to be accepted, and the acceptance is not made in such manner, the proposer may, within a reasonable time after the acceptance is communicated to him, insist that his proposal shall be accepted in the prescribed manner, and not otherwise; but if he fails to do so, he accepts the acceptance, (a) for silence signifies assent, if it be coupled with some overt acquiescence.

An acceptance subject to a condition and reservation is equivalent to a refusal coupled with a new proposal. In order to form a valid contract, the acceptance must be absolute and identical with the terms of the offer or proposal. Where a Court has to find a contract in a correspondence, and not in one particular note or memorandum formally signed, the whole of that which passed between the parties must be taken into consideration. (b) The Statute of Frauds is a weapon of defence, not offence, and does not make any signed instrument a valid contract by reason of the signature, if it is not such according to the good faith and real intention of the parties. (c)

(a) Greenwood's P. of Conveyancing, 5th Ed., 28—29. As to contracts for sale by letters, see *Port Canning Company v. Smith*, L. R., 1 I. A., 124; *Waman Ramchandra v. Dhondiba Krishnaji*, I. L. R., 4 Bom. 126.

(b) Act IX of 1872, Sec. 7.

(c) *Per* EARL CAIRNS, L.C., *Hussey v. Horne-Payne* L.R., 4 Ap. Cas. 311.

(c) *Per* LORD SELWYNE, *Ibid.*, L.R., 4 Ap. Cas., at p. 323.

The vendor of certain immovable property agreed to sell such property and the purchaser agreed to purchase it on the understanding that the purchaser should retain part of the purchase-money and therewith discharge certain bond-debts due by the vendor for the payment of which such property was hypothecated in the bonds. On such understanding the vendor executed a conveyance of such property to the purchaser. *Held*, in a suit by the purchaser for the possession of such property in virtue of such conveyance, that the purchaser, not having paid such bond-debts or done anything to account for such part of the purchase-money according to such understanding, the contract of sale had not been completed and the suit was therefore not maintainable. (d) The defendant in this case was the vendor, and he had appealed to the Allahabad High Court upon the following grounds: (i) that the plaintiff, having by means of a proviso which he did not mean to perform, induced the defendant to execute the deed of sale, had been guilty of fraud and was not entitled to any relief; and (ii) that the plaintiff, having failed to perform his part of the contract of sale, was not entitled to a decree under that contract, and his suit should have been dismissed. In delivering the judgment of the Court, Sir Robert Stuart, C. J., *inter alia* observed:—"On the merits we are clearly of opinion that the defendant's contention is right, and that this appeal must be allowed. The consideration in the sale-deed was Rs. 16,000, Rs. 2,000 of which was paid in cash, and the remaining Rs. 14,000 were to be applied by the plaintiff towards the payment and discharge of three bonds. If this engagement had been fulfilled by the plaintiff, it would have been his duty to have returned the discharged bonds to the defendant; but this he has not done, nor has he paid the bond-debts, or done anything to account for the Rs. 14,000 in the manner provided by the sale-deed. The contract between the plaintiff and defendant was, therefore, incomplete, and indeed merely inchoate, and the property, possession of

(d) *Ikkal Begam v. Gobind Prasad*, I. L. R., 3 All. 77.

which he claims, did not pass to him. It is laid down in Sugden's Vendors and Purchasers, 14th Ed, p. 241, that 'a purchaser cannot maintain an action for breach of contract without having tendered a conveyance and the purchase-money,' and this appears directly in point in the present case; for here although there was an intended contract and the execution of a conveyance or sale-deed, there has been a manifest withholding of the purchase-money, and therefore the plaintiff can not maintain his suit." (e)

Transfer of ownership of movable property when sold with immovable.

Where an agreement is made for the sale of immovable and movable property combined, the ownership of the movable property does not pass before the transfer of the immovable property. A agrees with B for the sale of a house and furniture. The ownership of the furniture does not pass to B until the house is conveyed to B. (f)

A mere agreement to transfer is executory and is not to operate as a sale *in present*.

Where it was agreed between A and B that, in consideration of certain proceedings to be instituted jointly by A and B, and payments to be made by B, for the recovery of certain property claimed by A against C, A would make over half of the property recovered to B; but A, contrary to terms of the agreement, without the consent of B, compromised his claim with C, and obtained possession,—it was held that the agreement did not operate as a present transfer of the property to B; and that B the plaintiff could not sue to eject A. *Semle*.—B's proper remedy was a suit for specific performance or for damages for breach of the contract, to support which it would have been necessary for the plaintiff to have alleged either performance of her part of the contract, or at least that she was ready and willing to perform this condition, but was prevented by the wrongful act of the defendant A. (g)

(e) I. L. R., 3 All at pp. 80—81.

(f) The Indian Contract Act, 1872, sec 85. See *Dhondiba Krishnaji Raut v. Ram chandra Bhagbat*, I. L. R., 5 Bom. 554—5.

(g) *Rani Bhadosendari v. Iswar Chunder Dutt*, 11 B L R., 36. (P. C.) See also *Tara S. Choudhram v. The Court of Wards*, 20 W. R., 446.

The mere fact of a tenant entering into an agreement to purchase the estate will not work a surrender of his tenancy by operation of law, because such a contract contains an implied condition that the landlord should make out a good title, and it would be most unreasonable to suppose that the tenant intended absolutely to surrender an existing term, while it was uncertain whether the purchase would be completed or not (A)

When the purchaser of an estate paid earnest-money, and no time was fixed for the payment of the balance, and the vendor re-sold the property within a week. It was held that the vendor was bound to have waited a reasonable period; that the second purchaser took nothing; and that the first purchaser was entitled to a decree for specific performance (i)

A mere agreement to sell a certain property, without any consideration passing, cannot bar the right of the vendor on the same day to sell a portion of the property to a third party, or invalidate the third party's purchase (j)

Where parties have entered into a written contract for the purchase of property, the Court should see whether a binding sale was intended although purchase-money was not paid. (k)

In suit upon a contract for sale, in which it was agreed that if the defendant did not execute a conveyance the contract would itself operate as such, it was held that the contract was in fact a conveyance under which the plaintiff can hold against subsequent purchasers. (l)

Where an estate was sold under a contract at ten and a half years' purchase of the net annual rent collections, and various sums of money were left in deposit with the vendee to meet various charges which were expected to arise, and the amount of these charges were regulated by the vendor's expect-

(A) Taylor on Evidence, 5th Edition, p. 877

(i) *Muthur Ali v. Sheo Sahay Singh*, W. R., 1864, 281. See also *Raj-bhore Nag v. Mudhoosudan Roy*, 20 W. R., 385; *Ram Lakhan Rai v. Bandan Rai*, I. L. R., 2 All. 711; ante p. 33.

(j) *Bhoyunkursee Debea v. Tarney Churan Chuckerbutty*, 7 W. R., 28.

(k) *Mahadeo Begum v. Syed Huseebul Hossain*, 15 W. R., 44.

(l) *Shama Churan Naggy v. Nobin Chunder Dhotak*, 15 W. R., 239.

ations, and formed portions of the stipulations of which the contract was composed ; but the net annual collections eventually fell short of these expectations : *Held*, that the agreement at the root of the contract, *viz.*, that the property was taken at 10½ years' purchase should govern the whole transaction, and that the accounts between the parties should be adjusted accordingly. Here the arrangement between the parties was that if the hastbood proved to be less than Rs 1,043 (the amount stated by the vendors), the purchase-money of the whole property should be diminished in proportion. There was also a stipulation that the price of the estate should be increased in the same proportion, if the hastbood showed a larger yearly net profit than Rs. 1,040. (*m*)

Where M executed on behalf of N a *lādāvināmāh*, or deed of disclaimer, disclaiming all right to an estate to which he was one of the heirs-at-law, upon a consideration of receiving a monthly allowance for maintenance, and accepted a perwanah securing that allowance to himself and his heirs : *Held* that the *lādāvināmāh* and the perwanah amounted to a valid contract by which the parties were respectively bound ; and that the *lādāvināmāh* being founded on good consideration, was binding on the heirs, who could not set it aside except by returning the money which had been paid in advance on account of the maintenance allowance. (*n*)

A contract for sale or purchase of land by a minor, whether consummated by a conveyance or not, is absolutely void. (*o*)

A guardian cannot grant a lease of his ward's lands in perpetuity except on the most distinct proof that his doing so would benefit the minor. Where no assertion is even made that such was the reason of the transfer, the presumption would be against the guardian's *bond fides* and there would be nothing to bind the ward, when he came of age, from disputing with a view to cancelment any such unwarranted engagement. (*p*)

(*m*) *Opender narsain Mookerjee v. Gudadhari Dey*, 25 W. R., 472—74.
 (*n*) *Gurao Begum v. The Nawab Nazim of Bengal*, 24 W.R., 28. (P.C.)
 (*o*) Act IX of 1872, secs. 11 and 2 cl. (g).
 (*p*) *Oddeyo C. Koondeo v. Prosunno K. Bhattacharjee*, 2 W.R., 325—6.
 Also *Syud Loofy Hossein v. Dursun Lal Sahoo*, 23 W.R., 424 ; ante p. 228—303

An insane person is competent to *purchase*, and also to retain what he purchases ; though he can not be compelled to retain it,—the transaction (if found to be disadvantageous to him) being liable to subsequent avoidance on the ground of his insanity. (q) Dealings of sale and purchase by a person apparently sane, though subsequently found to be insane, will not be set aside against those who have dealt with him upon the faith of his being a person of competent understanding. Nor can an infant take advantage of his own fraud in representing himself of full age. (r)

In September 1849, one Kelsall agreed in writing to sell to McArthur a four-annas share, and also to assign his interest in two-annas other share of a certain Indigo factory ; “half of the purchase-money to be paid at the time of the execution of the conveyance, and the other half on the 1st March following.” The same attorney was then employed by both vendor and vendee, but the latter shortly afterwards appointed other attorneys to act on his part. Considerable delay intervened, in consequence (among other causes) of the attorney for the vendor insisting on the execution of the conveyances prepared by himself, which the purchaser’s attorneys declined to accept, and *vice versa*. On the 3rd October, Kelsall gave notice that he had rescinded the contract. The following day McArthur’s attorneys offered their deeds of conveyance for execution and at the same time tendered *half* the purchase-money which was refused. On the same day the defendant Abbot purchased the interest contracted to be sold to McArthur and shortly afterwards sold the two-annas share to the defendant Greenway. Upon a bill of complaint filed by McArthur against Kelsall, Abbot and Greenway, it was held by the late Calcutta Supreme Court (Peel C. J., Buller and Colvile J. J.) *firstly* that time was not originally of the essence of the contract ; *secondly* that it had not been subsequently made so by the acts of either party

(q) Stephen’s Commentaries, Vol. I., 6th Ed. p. 490. See however Sec II, Act IX of 1872. As to sales of Lunatic’s property, see *ante* p. 305.

(r) Kerr on Fraud, p. 98—101.

McArthur or Kelsall; *thirdly* that (on the above grounds, and as McArthur had not under the circumstances by reason of laches, wilful delay or otherwise disentitled himself to relief) Kelsall had improperly attempted to rescind the contract; and a specific performance was accordingly decreed. An injunction had previously been granted, as against the other defendants in this suit upon the application of the plaintiff, in order to restrain them from making any further alienation *pendente lite* of the property in dispute. "It is obviously consistent with natural justice to compel a party to perform his contract, if it be possible, and the contract be not inequitable in itself, and to treat those, who with actual notice of it, take a conveyance in violation of it as equally subject to its obligations." (s)

In re *Dagenham Dock Company*, (t) there was an agreement by the company to purchase land for £4,000, whereof £2,000 was to be paid at once and the balance £2,000 paid on a future day, with a provision that, if the whole of £2,000 and interest was not so paid, the vendor might re-enter without any obligation to repay the £2,000. This was held to be a penalty, and the purchaser was declared entitled to relief on payment of the balance of purchase-money with interest.

"Ancestral property" is not confined to such property as the Ancestral father derives from his father or any ancestor, property. but it also means "paternal property," at least immovable property derived from the father, howsoever acquired by him, (u) and the sale of such property by the managing owner thereof is subject to restrictions, under the Hindu law. In Bengal, however, this father's dominion over such property is absolute. (v) We have seen that qualified owners and persons having a power of sale by implication under the Hindu law may sell in case of family calamity, distress, indebtedness or other

(s) *McArthur v. Kelsall*, 1 Taylor and Bell's Rep. at p. 181, 167.

(t) L. R., 8 Ch., 1022.

(u) *Raymohun Gossain v. Gour mohun Gossain*, 4 W. R., (P.C.) 47.

(v) See Sales of Ancestral property, ante Ch. IV., Sec. 6, p. 256—268.

pressure amounting to "a legal necessity." (w) "The expression 'legal necessity,'" said Mr. Justice Mahmood, "has not been ex-

haustively defined by any authentic decision. It is only by instances that an idea of what amounts to legal necessity can be gathered from the Hindu law and the numerous decisions to be found in the reports. Mere speculative litigation can not be regarded as a legal necessity under the Hindu law. But any litigation which has for its object the protection of property in possession from wrongful invasion, may give rise to legal necessity.....It may also be conceded that a Hindu widow, when wrongfully deprived of her husband's property, may raise necessary funds on the security of that property for the purpose of recovering possession." (x)

Under the Mitāksharā any alienation by the father of ancestral property made after the birth of the son without the consent of the son, unless for a purpose justified by the Hindu law as a legal necessity, will not bind the son. If, therefore, the father, during the minority of the son, alienated the properties in fraud of his creditors, such fraud would not bind the son who was neither a party nor a privy to such fraud. The acts of the father, even if fraudulent are not binding upon the son, inasmuch as the son does not claim through his father, his title being from *birth*,—a title wholly independent of, and equal to that of, the father. (y)

It is settled law in the Presidency of Bombay that one of several coparceners in a Hindu undivided family, may without the assent of his coparceners, sell or mortgage, *for valuable consideration*, his share in the undivided family estate, movable or immovable (z) Such purchaser or mortgagee of an unascer-

(w) *Hanuman Prasad's Case*, 6 M. I. A., 393. *Babaji Mahadaji v. Krishnaji Devji*, I.L.R., 2 Bom., 666—69. See also *ante* Ch. IV., Secs. 6, 7 (A) and 8, pp. 256—308.

(x) I. L. R., 4 All., at p. 542. See also *Grose v. Anantamayi Dasi*, 4 B. L. R., O. C., 1; 12 W. R., O. C., 13.

(y) *Beer Kishore Suhya Singh v. Babu Hurbulab Narain Singh*, 7 W. R. 502.

(z) *Varadew Bhat v. Venkatesh*, 10 Bom. H.C.R., 139, 162 (F.B.)

ained share can not before partition insist upon the possession of any particular portion of the undivided family estate.

. In Madras the right of a co-parcener to alienate by sale, gift or otherwise his vested interest in the property held in co-parcenary is limited to the extent of the co-parcener's share in the particular property which is the subject of the alienation. The rule is founded upon the principle that each co-parcener has a vested present undivided estate in his share, which he may at any time convert into an estate in severalty by a compulsory or voluntary partition, and that such estate is transferable like any other interest in property. (a)

A contract entered into by a Hindu married woman, jointly with her husband and separately for herself, must in the absence of special circumstances, be considered as entered into with reference to her stridhan, which is analogous to a woman's separate property in England. (b)

Where a share in an estate had been sold under a stipulation that the purchaser should possess it himself as landlord, or, if desirous of parting with it, should restore it to the original owner or his heirs at a fixed price; and the purchaser having been restrained by this agreement from selling off this property to a third person, had, on his retirement to England, given other persons a *farming lease* of it for *fifteen* years: Held, that as the object of the original stipulation was to secure the constant possession of the share to some one with whom the original owner or his heirs, who still retained the residue of the estate, could keep up friendly relations, the grant of the farmer's lease was a violation of the covenant; and that the heirs of the original owner were entitled to have the share in suit conveyed to them at the stipulated price. (c) Here although the vendees were forbidden to alienate by the express terms of the *okrâr*, still they evaded and did the nearest thing they could to it, by giving a lease for a long term.

(a) *Venkata chella Pillay v. Chinnaiya Mudaliar*, 5 Mad., 166-71.

(b) *Gorinji Khimji v. Lakmidas nathubhoj*, L. L. R., 4 Bom., 318.

(c) *Ramnath Sen Lushkar v. J. P. Wise*, 25 W. R., 379. See also *Right of Re-purchase, ante*, pp. 226-27.

Where property was sold nominally by benâmidârs, but in reality by the real owner, and the consideration was the debts due from him to the vendee, the sale was held to be perfectly legal as against the real owner, and therefore as against creditors seeking to execute their decree against him after such sale. (d)

Section 1.—Conditions of Sale.

Presumptively a vendor is bound to know his own title, so far at least as with ordinary diligence he may know it. (e) It is therefore his duty "to give substantially correct information, at all events to the extent of his own actual knowledge of all facts material to the description or title of the estate or interest offered for sale, but not of extraneous facts affecting its value: the seller, for example, is not bound to tell the buyer what price he himself gave for the property." (f) A misdescription materially affecting the value, title or character of the property sold will make the contract voidable at the purchaser's option, and this notwithstanding special conditions of sale providing that errors of description shall be matter for compensation only. (g)

A condition of sale is bad as misleading (1) if it requires the purchaser to assume what the vendor knows to be false; (2) if it states that the state of the title is not accurately known when in fact it is known to the vendor. When the conditions on the face of them purport to give only a good holding title, the purchaser on being relieved from them is not entitled to have more than a good holding title. Even where the condition of sale is a misleading one, the purchaser is entitled to have a good holding title notwithstanding the condition, or else to rescind his contract. (h)

(d) *Monohur Dass v. Bhikari Bhagut*, 24 W.R., 253. See also *Nidhi Singh v. Bissonath Dass*, 24 W.R., 79.

(e) See *ante*, p. 129.

(f) 3 App. Ca., 1267.

(g) *Flight v. Booth*, 1 Bing. N. C., 370, 377; *Phillips v. Caldwell*, 1 L. R., 4 Q.B., 159, 161.

(h) *Broad v. Muntion*, L. R., 12 Ch. D., 131.

Under the Specific Relief Act, the purchaser is entitled to a title free from reasonable doubt. (i) If there is an apparent doubt in a title, which can be settled only by further litigation, the purchaser can not be forced to buy a law-suit.

There are several things which are quite clear with regard to a contract founded on conditions of sale. One is this, that the vendor, who means to exclude the purchaser from his common-law right to have a good title shown, must do so by explicit and clear words. Another is, that, if the vendor seeks to exclude the purchaser by a statement of fact, he must prove the fact to be true, and the statement of fact must be an honest and fair one; it must not for the purpose in hand be a part of the truth only; it must, so far as that purpose is concerned, be the truth and the whole truth. It must, therefore, not mislead an ignorant person. One of the main reasons why the Courts have treated conditions of sale in this way is, that the vendor is a person who knows, and he is stipulating with the purchaser, a person who does *not* know. It is, therefore, of course fair that the person who *does* know should express his meaning so as to be perfectly intelligible to the person who does *not* know. Another thing equally plain is this, that where the conditions of sale are framed in bad faith, so as in effect to *trap the purchaser*, the Court will not hold him to be bound. It is also perfectly plain that where the sale is under the direction of the Court, the Court will lean, if possible, to a more exact requirement of good faith and honesty on the part of the vendor; it will endeavour to insist upon that fair, straightforward, honest, open dealing which ought to characterise transactions between vendor and purchaser. (j) "I take it," observed Cotton L. J., "that conditions of sale must be fair, and in the conditions of sale there must not be made any representation or condition which can mislead the purchaser as to facts within the knowledge of the vendor; and that the vendor is not at liberty to require the purchaser to assume as the root of his title that which documents in his

(i) Act I of 1877, Sec. 25, Cl. (b) and (c).

(j) *Per* Fry, J., in *re Banister Broad v. Munton*, L.R., 12 Ch. D. 135.

possession show not to be the fact, even though those documents may show a perfectly good title on another ground. Where the sale is by the Court, the Court is bound to take special care, if possible, that there shall be nothing in the conditions, or in the representations therein contained, which by possibility can mislead a purchaser, because the purchaser has a right to assume that the Court will take good care that there shall be nothing that can in any way mislead him as to the title he is getting." (l)

Vendors of land may, and constantly do in practice, sell under conditions requiring the purchaser to assume particular states of fact and title. Although when parties do not possess a title prior to a particular date, they may fairly make it a condition that no title prior to that date shall be required, it is not fair or honest to say that the title commences on a certain date when it does not commence then, and when the vendor has prior deeds in his hands which show his title to be bad. (l) In most cases the production of the earlier title-deeds would have the effect of putting the purchasers on their guard while their concealment or suppression takes in unwary purchasers and is a device often adopted by unscrupulous attorneys and land-agents.

Where there is a condition of sale that no title to the property sold shall be shown before a certain date, the purchaser is entitled to ascertain *alimule* that such prior title is not defective and that there is no concealment of an incumbrance or other flaw in the title prior to that date. (m)

Earnest-money is a deposit of part of the purchase-money with the vendor; and the moment it is paid the purchaser acquires a lien on the property agreed to be sold to the extent of such deposit, and such lien could only be lost by reason of his failing to carry out his side of the contract. (n)

(l) In re *Binister Broad v. Winton*, L. R., 12 Ch. D., at pp. 149-50.

(l) Per MACPHERSON, J., in *Dwarkanath Bysack v. Dinobundhoo Mullick*, 18 W. R., 305-6.

(m) *Manoharjee Pestonjee v. Narayan Lakshmanji*, 1 Bom. H.C. Rep. 77.

(n) Per PHEAR, J., *Kenny v. Admiral-General of Bengal*, 3 B.L.R., O.C., 79.

A statement that property is sold subject to all rights of way and water and other easements (if any) existing over and upon the same is frequently inserted in the contract.

Where an advertisement is published by A, setting forth a description of the villages, and calling upon intending purchasers to come forward, it was held that such advertisement was substantially an implied warranty of title, and would in any case, make him responsible to the purchaser deceived by such misrepresentation. (c)

Restrictive conditions of sale are of two classes: (i) conditions whereby the purchaser is simply prevented from putting the vendor to prove particular things, in which case the purchaser is at liberty to ascertain and prove them himself *aliunde*; (ii) the stricter form of conditions whereby the purchaser is required and bound to take certain facts as true, or a certain title as good, whatever evidence he may discover to the contrary. The purchaser is, in fact, to take such title as the vendor has, and he can not insist upon what he has no right to insist on.

A contract for the sale of superfluous land of a railway company which had been conveyed by the company to the purchaser shall admit a defective title. The vendor contained a stipulation that the purchaser should admit and assume that everything (if any thing was necessary) was done by the company to enable them to sell the land as surplus land, and should not call for or require production of any evidence to that effect; and a further stipulation that if the purchaser should fail to comply with the terms of the agreement, the deposit should be forfeited to the vendor. The land was not situate in a town or used for building purposes. In the course of investigation of the title the purchaser discovered that the prior owners had not waived their right of pre-emption; and as the vendor refused to remedy the defect, the purchaser brought an action claiming a return of the deposit and damages. The vendor then sold the land to one of the prior owners. It was held that the purchaser was bound by the stipulation to admit the title of the company to

(c). *Rajah Nilmoney Singh v. Gordon, Stewart & Co*, 9 W.R., 371.

sell to the vendor ; and that as he had refused to abide by that stipulation he had broken the contract and could not maintain the action, or claim a return of his deposit. "If the purchaser," observed James L. J., "agrees to *admit*, he must admit and assume for all purposes and upon all occasions that every thing was done by the company necessary to enable them to sell and convey the land to purchaser ; and if he does not admit that, he has broken the contract and can not complain that the defendant has broken it. He entered into the contract with eyes open, and is not now entitled to be released from it." (*p*).

Freehold property was sold in 1877 subject to a condition that the title should commence with a deed dated the 30th of December 1867, and that no earlier or other title should be enquired into by the purchaser : it was held that the condition did not preclude the purchaser from insisting on an objection to the prior title which was not discovered through an inquiry made by him, but was accidentally disclosed by the vendor. (*q*)

A sale was made by the Court of Chancery under conditions which precluded the purchaser from objecting to the title prior to the document chosen as root of title, and made recitals in deeds more than 20 years old conclusive. A recital covered by the condition was so framed as to conceal a defect of title prior to the date fixed for the commencement of title. The purchaser enquired into the prior title, and refused to complete on the ground that the prior title was bad ; and the Court being of opinion that such objection was well founded, it was held that the sale being by Court, the purchaser was not precluded by the conditions from raising the objection, and ought to be discharged from his purchase. (*r*)

If the vendor does not intend to offer an unqualified estate or interest, the qualifications should appear on the face of the particulars. Concealment in the particulars is not excused by a

(*p*) *Best v. Hamond*, L. R., 12 Ch. D., 9.

(*q*) *Smith v. Robinson*, L. R., 13 Ch. D., 148.

(*r*) *Else v. Else*, L.R., 13 Eq., 196.

correct statement in the conditions of sale, though these were read out at the sale. (s)

The essentials of particulars of sale. . The particulars should fairly and accurately describe the property, or the estate or interest therein sought to be sold. They should describe everything which it is material for the purchaser to know, in order, to judge of the nature or value of the property. Permanent charges and restrictive rights should be noticed. Doubtful particulars and conditions of sale are construed in favour of the purchaser and strictly against the vendor, but not so as to contravene a well-known rule of law or universal custom. Catching conditions. Catching conditions bind the purchaser whose attention is directed to their objectionable character. Vendor's undertaking in contracts will be strictly construed against him (t)

Verbal declarations at a sale at variance with the particulars should be reduced into writing, by making the requisite alterations in the printed particulars or conditions.

Where trustees sell under conditions of sale, a clause is usually inserted stating that the parties beneficially entitled to the estate shall not be required to join in the conveyance. (u)

It is not necessary, in the transfer of property subject to public rights to allege those rights; they attach themselves necessarily to the land, and it is taken subject to them. (v)

Special mention ought to be made in the advertisement and particulars of sale of any fact or circumstance in the property to be sold which gives to it some peculiar or additional value or attraction, or subjects it to some right, easement or rentcharge in favour of any proprietor or proprietors other than the vendor.

Where there is a road or a ghaut on the banks of a navigable river to be enjoyed as private property, portion of and incident to the land to be sold, it is a very important ingredient in the matter of the contract and is usually stated in

(s) *Torrance v. Bolton*, 8 Ch. 118.

(t) *Dart's V. and P.*, 5th Ed., Vol. I.

(u) *Greenwood's Practice of Conveyancing*, p. 19.

(v) *Gann v. The Free Fishers of Whitstable*, 11 H. L. C., 192.

the advertisement and particulars of sale (x). But the purchaser ought to take care to verify these statements by personal observation or inquiry.

At a sale by auction under a notice, the property sold was advertised as stated in the particulars to contain 753 square yards or thereabouts, and one of the conditions of sale provided that if any error, mis-statement, or omission in the particulars should be discovered, it should not annul the sale, nor should any compensation be allowed by the vendor to purchaser in respect thereof. The property was found to contain 573 square yards only, it was held, that the condition only applied to small errors, and did not cover so large a deficiency, and that the purchaser was entitled to compensation. (x)

Leaseholds in Liverpool were put up for sale under the direction of the Court in four lots, under a condition that the purchasers should enter into the usual covenant for paying and observing the rents and covenants of the leases, and indemnifying the vendors therefrom. There was no condition as to the leases being produced, nor that the purchasers should be deemed to have notice of their contents. As to one of the lots, the purchasers stated the rents at which the different parts of it were underlet, and the amount of a mortgage on it; but owing to a slip, did not mention that it was subject to any ground-rent. It was, in fact, subject to a ground-rent of £43. A purchaser bought this lot for £1400, and applied to be discharged from his purchase, both he and his solicitor deposing that they were led by the particulars to believe, and did believe that the property was not subject to any ground-rent:—*Held* that the purchaser was entitled to be discharged. (y) Jessel, M. R., observed:—"It cannot be said to be fair mode of drawing a particular of sale of lease-hold houses subject to a ground-rent of £43 a year, to say nothing about the rent. I have never seen such a particular, though I have had a very great deal of experience both at the Bar and on the Bench as to

(x) *Per PHILLIPS, J., Sirkar v. Biswas*, 9 B.L.R., at p. 134.

(x) *Whittemore v. Whittemore*, L. R., 8 Eq., 603.

(y) *Jones v. Rimmer*, L. R., 14 Ch. D., 588.

sales of lease-hold property. I asked both sides whether any body else have ever seen such a particular. Not only did I not obtain any response to that question, but I find that in this very case the omission had occurred through a mere slip, that the particular was intended to be in the proper form, but that by some accident, the pen had been drawn through the statement of the ground-rent. It is said, and no doubt truly said, that as a rule when lease-holds are sold which are held at a pepper-corn-rent, or free from rent, or at a nominal rent, that also is stated, and of course if the purchaser had been careful he would have enquired; but still I think not only that he was misled, but, if I may say so, that *he had a fair title to be misled*, and consequently that this is not a case in which the Court ought in the exercise of its discretion to direct specific performance. It must not be forgotten that the Court has refused specific performance even where the mistake of the purchaser has not been induced by any act or omission of the vendor, and *a fortiori* it ought to be refused where the omission of the vendor to draw his particulars in the fair and ordinary way has conduced to that mistake." (z)

Where it was made a distinct condition of sale that the property should be sold to the highest bidder, without any restriction of the purchaser being a rebel or not, *Held* (i) that the government may, like any other seller, impose any condition it pleases with reference to the property which it offers for sale, prior to sale, but is not at liberty subsequently to the bid and deposit of the earnest-money to disaffirm or annul it on a ground not only novel but directly at variance with the terms on which it offered the property for sale; (ii) that the government was bound to make over possession irrespective of the character of the highest bidder, inasmuch as when the property was knocked down the relation of vendee and vendor existed between him and the government; and (iii) that a suit may, therefore, be brought against the government by such purchaser, if the government refuses to give up

(z) *Per* JESSEL, M.R. in *Jones v. Rimmer*, L. R., 11 Ch., 592.

possession or transfers the possession to another (a) The Privy Council remarked that the government in conducting the sale "was exactly in the situation of an individual selling his property by auction ; and when the property was knocked down the relation of vendor and vendee existed between the government and the highest bidder".

The notice of the interests to be put up for sale is alone what must be looked to as affording an estimate of the value and extent of the purchase (b)

Section 2.—Persons capable of Selling and Buying.

Every person is competent to contract who is of the age of majority according to the law to which he is subject, and who is of sound mind, and is not disqualified from contracting by any law to which he is subject. (c)

Under the Transfer of Property Act, every person competent to contract and entitled to transferable property, or authorized to dispose of transferable property not his own, is competent to transfer such property either wholly or in part and either absolutely or conditionally, in the circumstances, to the extent and in the manner, allowed and prescribed by any law for the time being in force. (d) A man's authority to sell or mortgage "transferable property not his own" may be either (i) express under a power ; or (ii) arise by implication of the law to which he is subject, *e.g.*, where upon an emergency family property is alienated either by a managing member of a Hindu undivided family or by a Hindu widow without the consent of her husband's kin. (e)

A, a trustee, is simply authorized to sell land by public auction. He cannot sell the land by private contract. (f)

(a) *Shao Lall Bohra v. Shukh Muhammad* 13 W. R. (P. C.) 4—6.

(b) *Woomanath Roy v. Joyuntee Debye*, W. R., 1864, 55.

(c) The Indian Contract Act, IX of 1872, sec. 11.

(d) Act IV of 1882, sec. 7.

(e) See *ante* pp 279—83, 294—295.

(f) Illus. (a) to sec. 11, Act II of 1882. As to Sales by Agents, see *ante*, p 324.

A, as the trustee of certain land for X, Y and Z (beneficiaries), is authorized to sell the land to B for a specified sum. X, Y and Z, being *competent* to contract, consent that A may sell the land to C for a less sum. A may sell the land accordingly. (g)

We have seen that a sale may be made of ancestral property by the managing member of a Hindu family for satisfying a family necessity. —e. g. a father, for satisfying a "family necessity". (h) The purchaser in all such cases is bound to enquire into the necessity justifying the sale, to ascertain that the person he is dealing with is really the manager, and to satisfy himself that the sale is requisite for the purpose of paying off a debt binding on the family or averting some family crisis or calamity. He must be reasonably led to believe in good faith there is a *prima facie* legal necessity binding on the infant members of the family. For example, "it might be highly desirable," said Mr. Justice West, "in the interests of the family, that a mortgage and a bond at high interest should be paid off, even by a sale of ancestral property, rather than allowed to grow to an overwhelming amount. The mere fact that the father did not wait until the debts and interest had grown to an unmanageable sum or to the whole value of the family estate, is not, we think a sufficient reason for saying that the apparent ground of necessity was wholly unreal, or a mere invention of the father and the creditor. The expression 'family necessity,' when used to justify the sale of ancestral property, must be construed reasonably, and the head of the family and those dealing with him must, in the interest of the family itself, be supported in transactions which though in themselves diminishing the estate, yet prevent or tend to prevent still greater losses. A reasonable latitude too, must be allowed for the exercise of the manager's judgment, especially in the case of a father, though this must not be extended so as to free the person dealing with

(g) *Illustr. (b)*, to sec. 11, Act II of 1882.

(h) See *ante*, pp. 263, 268, 279—80, 294—95.

him from the need of all precautions where a minor son has an interest in the property." (i) The circumstances must be such as not to touch "the good faith and propriety of the transaction." Where, therefore, a debt of Rs. 88 was incurred after the father's illness and consequent impoverishment, to buy a stock of buffaloes with which to resume his business as a milkman, it was held to be a valid debt, inasmuch "as the debt being contracted to put the father once more in the way of earning a maintenance, was created under the pressure of a family necessity which the Hindu Law fully recognized. That law does not require the father to lie down in idleness until starvation is actually at his door before parting with the family estate; it recognizes as necessity any emergency in which plainly, and not through any course of subtle or sophistical reasoning, the proposed transaction is the only obvious means, or the obviously proper means, of averting some greater calamity, as absolute pauperism would be." (j) A *bonâ fide* purchaser for value from the father or other Kartâ of the family will, therefore, be invariably protected.

An alienation by a Hindu widow of her deceased husband's estate for pious and religious purposes, made for her own spiritual welfare, and not for that of her deceased husband, is not valid. (k) But her dominion over her *stridhan* is absolute.

The first thing to be done by the solicitor of the purchaser, on having a communication made to him by his client of a contract entered into by him for the purchase of an estate, is to ascertain, by due enquiries, that the purchaser is competent to enter into and perfect the contract in view, that is to say, not prevented by infancy, coverture, or the like, and moreover, that he is not so placed with respect to any personal connexion he may have with the estate, or influence over the vendor, as to be prohibited by the policy of the law from becoming a purchaser.

(i) *Babaji Mahadaji v. Krishnaji Desai*, I.L.R., 2 Bom., 666—69.

(j) *Ibid.*, 669. Compare the observations of East, C.J., *ante* p. 279—80.

(k) *Puran Dai v. Jai Narain*, I.L.R., 4 All., 482. As to Sales by Hindu Widows, see *ante*, Ch. IV, Secs. 7 (A) and 7 (B), pp. 269—287.

Trustees are forbidden by "the rules of equity and good conscience" to purchase the trust-estate except under the eye of the Court, "lest they should be induced to abuse their trust by exercising their legal powers over the estate with a view to their own advantage." (l)

A directs B to sell A's estate B buys the estate for himself in the name of C. A, on discovering that B has bought the estate for himself may repudiate the sale, if he can show that B has dishonestly concealed any material fact, or that the sale has been disadvantageous to him (m)

A directs B to sell A's estate B, on looking over the estate before selling it, finds a mine on the estate which is unknown to A. B informs A that he wishes to buy the estate for himself, but conceals the discovery of the mine. A allows B to buy, in ignorance of the existence of the mine. A, on discovering that B knew of the mine at the time he bought the estate, may either repudiate or adopt the sale at his option (n)

A directs B, his agent, to buy a certain house for him. B tells A it cannot be bought, and buys the house for himself. A may, on discovering that B has bought the house, compel him to sell it to A at the price he gave for it. (o)

Attorneys and pleaders cannot stipulate beyond just professional allowances. The Courts of equity, upon general principles of policy, will not permit an attorney or a pleader to accept anything from his client pending the suit, except his demand. "There would be no bounds," said Lord Thurlow, "to the crushing influence of his power, if it were not so." (p) An attorney, vakil or mukhtâr should not, therefore, as a rule purchase of his client during the continuance of such relationship between them, lest the situation of the client should render him unable, without fear of inconvenience, to refuse the solicitations of his attorney, vakil or mukhtâr.

(l) *Lister v. Lister*, 6 Ves. 631; *Coles v. Trecothick*, 9 Ves. 246; *Sander-son v. Wilkes*, 13 Ves. 603. See ante pp. 381—87.

(m) Act IX of 1872, sec. 215, illus (a).

(n) *Ibid*, sec. 215, illus. (b).

(o) *Ibid*, sec. 216, illustration.

(p) *Wallis v. Middleton*, 1 Cox, 125. See also *Fuseelun Beebee v. Omka Beebee*, 10 W.R., 469—73; *Nundeeput Mahta v. Urquhart*, 13 W.R., 240; 4 B.L.R., A.C., 181; ante, pp 399—402.

Agents and auctioneers, with respect of the lands of their principals, executors and administrators as to those of their testator or intestate, assignees or trustees of insolvents, committees of lunatics and guardians of infants, are all looked upon as trustees, and are therefore under a general disability to become the purchasers of the estates under their charge.

And the rule is the same as to stewards or managers of *tâluks* and *zamindâries*, for their personal superintendence of such *tâluks* and *zamindâries* may have furnished them with information of mines and other advantages unknown to their principals. (g)

So a person chosen an arbitrator, cannot buy up the unascertained claims of any of the parties to the reference: it would corrupt the fountain and contaminate the award. (r)

Where a person cannot purchase an estate himself, he cannot buy it as agent of another, and perhaps cannot even employ a third person to contract or bid for the estate on behalf of a stranger. (s)

Whenever, therefore, the purchaser's solicitor, upon the occasion of a contemplated purchase discovers any of these disabilities, it behoves him to recommend an abandonment of the contract, as the purchaser will, in all these cases, even after payment of his money, and the execution of a conveyance to him (unless the contract was carried into execution under the sanction of a Court of Justice), be considered as a trustee only for the vendor, and consequently will neither be capable of making a title to a future purchaser, nor be secure of a peaceable enjoyment of the estate himself.

But if none of these disabilities exist, it will then belong to the purchaser's solicitor to prepare a memorandum of the contract for purchase, to be submitted to the vendor or his solicitor for approval, and to be thereupon signed by the parties. It

(g) *Beaumont v. Boullie*, 5 Ves., 485; *Ormond v. Hautahinson*, 12 Ves., 27.
 (r) *Case v. Day*, 2 Ball & Beatty, 116; *Case v. Lord Allen*, 2 Ball & Beatty, 116.
 (s) *Case v. Day*, 2 Ball & Beatty, 116; *Case v. Lord Allen*, 2 Ball & Beatty, 116.

would be prudent on the part of the purchaser to obtain the signature of the vendor to the draft of the agreement before the engrossment thereof on stamped paper for execution by the parties.

Section 3.—What the Agreement* should contain.

The preliminary contract for sale and purchase entered into by the vendor and purchaser need never be complex or unnecessarily prolix, but should ordinarily contain (i) the names of the parties, their designation and place of residence; (ii) the agreement and the consideration; (iii) the nature and description of the estate or interest in the immovable property sought to be sold, the tenure by which it is held by the vendor, the leases or tenancies to which it is subject, and (iv) the time within which the transaction is to be completed.

Where, however, the state of the title of the proposed vendor is defective, an open contract must sedulously be avoided, and such restrictive stipulations ought to be inserted in the contract of sale as will effectually protect the vendor. When there is no necessity, special conditions need not be inserted.

It seems advisable in agreements for purchase, where the consideration is an annuity for the life of the vendor, to expressly declare, that the death of the vendor previously to the completion of the contract, shall not put an end to it, although a payment of the annuity shall not have become due, or having become due, shall not have been made or tendered;

* There is very little variety in the formal parts and infinite diversity in the essential stipulations of Agreements; and, therefore, forms and precedents are of less use in the preparation of those than of any other instruments. The draftsman having once made himself acquainted with the usual shape of an agreement, must prepare such as come before him from a consideration of the peculiar circumstances of each case, with but little regard to his precedent book. The leading terms of agreements are generally drawn out by the parties themselves, and the task of the professional draftsman consists in arranging those terms in proper order, clothing them with legal language, and supplying the deficiencies of provision for unforeseen contingencies. If the agreement to be prepared be special or complicated, this is a task of considerable difficulty, and one which can be successfully accomplished only by a person of considerable experience. Davidson's P. in Conveyancing, Vol. II, Part I, p. 1.

but that, on the contrary, the purchaser shall be entitled to a conveyance, on payment of a proportionate part of the annuity up to the death of the vendor. (t)

Whether the sale is by private agreement or by public auction the contract or the conditions of sale should fix a time for the completion of the sale on a day certain to be named therein. Such time is *not* of the essence of the contract, unless there is a stipulation to that effect either express or by implication.

It is usual to stipulate in private contract for a deposit by Deposit. the purchaser in part of the purchase-money. And in sales by auction, one of the conditions to be clearly stated is that the purchaser making default and neglecting to comply with the conditions is to forfeit his deposit as and by way of liquidated damages to the vendor. It must also be stipulated that upon such default being made the vendor shall be at liberty to re-sell the property and hold the purchaser liable for the deficiency in price upon such re-sale and the expenses thereof.

If the deposit is large in amount, its investment between the sale and the completion of the purchase is frequently provided for, in which case the vendor will be entitled to any increase, and must bear any loss in the value of the investment. (u) Should the purchase be vacated by reason of a defect in title, the purchaser will be entitled to receive the deposit with interest from the time of payment, together with his costs of investigating the title, and he will have a lien on the estate for the deposit. (v) Where the deposit is directed to be paid to the auctioneer, he is entitled to retain it until the contract is completed, without paying interest for it, because he is considered as a stake-holder or depositary (w). The vendor should be cautious as to whom he employs as his auctioneer, for any loss by the auctioneer's insolvency falls on him (x).

(t) Sugden's V. & P., 11th Ed., 335.

(u) *Bartholomew v. Brown*, 9 Hare, 609.

(v) *Bartholomew v. Brown*, 9 Hare, 609. See also Act I of 1877, sec. 18, cl.

(w) *Bartholomew v. Brown*, 9 Hare, 609.

(x) *Bartholomew v. Brown*, 9 Hare, 609.

(y) *Bartholomew v. Brown*, 9 Hare, 609.

The contract or the conditions of sale, as the case may be, interest on usually contains a stipulation for payment of purchase money interest, if from any cause whatever the purchase is not completed on the day agreed upon. In the absence of such stipulation the purchaser is not liable to pay any interest from the day fixed for the completion. The interest usually stipulated for, is 12 per cent per annum. Special conditions as to interest may be inserted in the contract as agreed upon between the parties.

In the Presidency-Towns of Calcutta, Bombay and Madras, the contract and the conditions of sale usually delivery of the abstract, contain a stipulation, that the vendor shall within a given time deliver to the purchaser or his solicitor an abstract of title; but the vendor is not bound to deliver such abstract independently of such condition. If upon the purchaser's application the vendor delays to deliver the abstract, the purchaser is relieved from the usual condition as to requisition and objections being delivered within a given time from such delivery of the abstract. (y) The wilful default of vendor to furnish an abstract within a proper time, when requested by the purchaser to do so, will entitle the purchaser to be relieved from the contract when the time fixed for completion has expired. (z)

An abstract at the time of its delivery to the purchaser should be as perfect as the vendor can make it. The abstract will be considered imperfect, if the concurrence of incumbrancers, or if any third party whose consent is necessary, can not be required.

Restrictive stipulations are conditions intended to relieve the vendor from his *prima facie* liability to deduce a marketable title,—must therefore be expressed in language the most clear and unambiguous; but if there be any misapprehension as to their meaning, they will be construed in favour of the person whose rights are restricted. (a)

(y) *Hobson v. Bell*, 2 Beav. 17.

(z) *Sutton v. Slade*, 7 Ves., 265.

(a) *Smith v. Watts*, 4 Drew, 338. See *ante* p. 437.

Special conditions warranted by the state of the title, may be and usually are inserted in the contract, thus the expense of obtaining copies of documents not in the vendor's possession, and other evidence requisite to verify the abstract, may be thrown upon a purchaser (b)

A trustee selling may stipulate for liberty to rescind the contract in the event of objections being taken which he is unable to remove. (c)

Restrictive stipulations as to title is no bar to the investigation of earlier title.

One of the most common conditions restrictive of the rights of a purchaser with reference to title is as to the commencement thereof. The vendor may stipulate for the production only of such title or evidence of title, as he may have, and a purchaser, under such a stipulation, will be compelled to complete although the title may be defective (d)

The stipulation for retardation of possession is a condition introduced for the benefit of the vendor, to enable him, in case the conveyance were ready to be executed before that day, to prevent any objection on the part of the vendee from being made to the payment of the money, by reason of the existence of any contract empowering possession to be retained against the purchaser until that time; which otherwise would be a defect of title, as the purchaser usually buys not subject to any lease but with a view to possession, and but for such provision would, on the payment of the money and execution of the conveyance, be entitled to immediate possession under the contract. (e)

A tenancy-at-will is determined by a contract for sale from the time at which possession is agreed to be given to the purchaser. (f)

(b) Frideaux's P. in Con., tit. Conditions of Sale

(c) *Hobson v. Bell*, 2 Beav., 17.

(d) *Stewart v. Wright & Madd.*, 354. See ante pp. 437—438.

(e) *See* *Chas. D. McArthur v. Kistell*, 1 Taylor & Bell's Rep., p. 184.

(f) *See* *Chas. D. McArthur v. Kistell*, 1 Taylor & Bell's Rep., p. 184.

Where possession is given by the vendor to the purchaser prior to completion of the bargain, it is proper for him to stipulate for the payment of rent or compensation for use and occupation by such purchaser

Section 4.—Of Rescission of Contracts.

A contract for sale might be rescinded in various ways: 1st, by the mutual consent of seller and buyer, 2nd, by non-performance of some of the conditions agreed upon; 3rd, by the lapse of a reasonable time from the date of the contract; 4th, by reason of force, fraud, error, misrepresentation, undue influence and other grounds of nullity. Rescission of a voidable contract must be made within a reasonable time by the party having the right to abide by or rescind such contract. Omission to repudiate a contract within a reasonable time is evidence, and may be conclusive evidence, of an election to affirm the contract. Where, therefore, one elects to rescind a contract, the repudiation must be prompt and effectual, *i. e.*, "as soon as possible after discovery of the true state of things." Stipulations for the right to rescind may vary greatly, and much will turn on their special form; but they must be acted upon *bonâ fide*. The right to rescind must be exercised as soon as it arises, for, if once waived, it can not be fallen back upon. (h) *

A person who has become the owner of a property which he knows very little about, may sell it to a person well acquainted with it, and in that case a material misrepresentation by the purchaser makes the contract, and even an executed conveyance pursuant to it, voidable at the vendor's option. (i)

(p) Mackenzie's Studies in Roman Law, p. 210
 (h) Collet's Law of Specific Relief in India, p. 208
 (i) *Haygarth v. Wearing*, L. R., 12 Eq. 320. See also Act. IV of 1882, sec. 55, para (5), cl. (a).

Although a vendor is not bound to disclose patent defects which the buyer could with ordinary care discover, (j) yet he must not while selling conceal a material defect, or divert the buyer's attention from it; (k) for such conduct is calculated to deceive, and is a fraud upon the purchaser (l)

A sells a field to B. There is a right of way over the field of which A has direct personal knowledge, but which he conceals from B. B is entitled to have the contract rescinded (m)

If a vendor, aware of a serious nuisance affecting his property, entrusts the sale to an agent who is ignorant of it, and who, on being asked by a purchaser, innocently denies its existence, the contract ought to be avoided (n)

Where a vendor knowing that he had no right or title to the property he wishes to sell, or being cognizant of incumbrances or of latent defects materially lowering its value, sold it and neglected to disclose such defects to the purchaser, it was held (i) that there was a fraudulent concealment vitiating the contract; and (ii) that the vendor was bound to refund the purchase-money to the vendee who had been ousted by a prior purchaser from the same vendor (o)

Where a party to a contract seeks release from its obligations, on the ground that, for some reason or another he is entitled to repudiate it, he must assert this right as soon after becoming aware of it as he reasonably can. Long inaction unaccounted for must be held in equity to be a ratification of the contract. (p)

He who would disaffirm a contract entered into by mistake, must do so within a reasonable time, and will not be allowed to do so unless both parties can be replaced in their original position. (q)

(j) Act IV of 1882, sec. 55, para. (1) cl. (a).

(k) Dart's V and P, 5th Ed, p. 92.

(l) Act IX of 1872, sec. 17, cl. (2) & (4).

(m) Act I of 1877, sec. 35, illus. to cl. (a).

(n) *National Exchange Co v. Drew*, 2 Macq., 108, 145

(o) *Basu Mohun Soor v. Abdul Sobhan Chowdhry*, 7 W. R., 258.

(p) *Behn Dhanraj Moondkar v. Eshkant Nath*, 9 W. R., 110.

(q) *Mohammed Ibrahim v. Qasim Umacha*, 1 Mad. H. C. Rep., 380.

The refusal of one of the parties to a contract to carry out a verbal agreement to register the deed not contained in the contract, does not give the other party a right to put an end to the contract *in toto*. His proper remedy is to apply to enforce registration under the Registration Act (r)

Where a person purchased certain lands under a bill of sale in which the vendor undertook to apply to the Revenue Authorities for the transfer of the lands to the name of the purchaser and did so, and both parties understood what they were doing:—Held that the refusal of the Revenue Authorities to enter the purchaser's name in the mutation register did not constitute a ground for cancelling the sale, and demanding back his purchase-money. (s)

The plaintiff Noor Ahmad purchased the property from the defendants Nawab Seraj-ood-dowla (mortgagor) and the Plaintiff's son (mortgagee) for Rs. 22,000, of which he paid Rs. 2,500 down, and retained 19,500 to repay money due to the plaintiff's son under a mortgage of the same property. The deed of sale contained provisions that the purchaser was to take upon himself the entire responsibility of settling with his son the mortgagee, and was not in any circumstances to be entitled to reclaim the purchase-money. Afterwards the defendants refused to effect mutation of names in favour of the plaintiff on the ground that he had not paid off the mortgage claims, and so fulfilled his part of the contract, but they did not repudiate the sale or the plaintiff's title thereunder. It was held that the refusal was not tantamount to a rescission of the sale, and that a suit for the recovery of the purchase-money would not lie. (t)

When it is provided by conditions of sale of land that the vendor shall not be bound to show any title prior to an instrument of a certain date, the purchaser may insist upon a defect of title appearing *aliunde* and before that date, and if it be

(r) *Gooroo Pershad Roy v. Roy Dhuupat Singh*, 14 W. R., 21.

(s) *Gedleera Kolita v. Debendra Narain Konwar*, 25 W. R., 352

(t) *Nawab Seraj-ood-dowla v. Sheikh Noor Ahmad*, 5 N. W. P., 194

proved to exist, may rescind the contract and recover back earnest-money, interest and expences. (u)

In most cases of rescission the special circumstances of each case will more or less affect the measure of compensation to be applied; the general principle being to seek, by means of compensation, to restore the parties to substantially the same position as if the contract had never been made; and where both are equally innocent, there ought not to be a bias unfavourable to defendant, but if the misconduct of the defendant has furnished the ground for the rescission, he can scarcely expect the Court to be curiously precise on behalf of a wrong-doer. (v)

Upon a sale of land, one of the conditions provided that if any objection was persisted in, the vendors might rescind the contract; and another condition provided that if any mistake should appear to have been made in the description of the property, or of the vendors' interest therein, such mistake should not vitiate the sale, but compensation should be given. The purchaser objected that certain minerals under the land appeared to belong to the lord of the manor; the vendors answered that this would not be compensated for, being the result of an enfranchisement as to which there was a condition. The purchaser persisted in the objection, and the vendors gave notice that they should rescind the contract. The purchaser then filed his bill for specific performance with compensation, and the vendors by their answer alleged that they had in fact a title to those minerals, but had rescinded under the conditions:—*Held*, that the objection taken by the purchaser was an objection to title to part of the property sold, the removal of which might involve a long and expensive inquiry; that the vendors had a right to rescind and that performance with compensation would not be compelled. (w)

(u) *Shankarji Potanji v. Narayan Lakhamaji*, 1 Bom. H. C. Rep., 111.
 (v) *See* *Law of Specific Relief in India*, p. 215.
 (w) *See* *Law of Specific Relief in India*, p. 215.

The owner of an estate agreed to sell it for £250,000, representing it to contain 1,530 acres. The purchaser assigned of contract Misrepresentation. Lien on deposit. agreed to sell it to a company for £350,000, of which £150,000 was paid to him, (£75,000 in cash, and bonds for £75,000) and he paid the vendor of the estate £50,000 as a deposit. It appeared that the estate contained less than 1,100 acres, and the company, having at the time only £1,536 in hand complained to the purchaser of the deficiency, and he then wrote to the vendor declining to complete. The company afterwards rescinded the contract, and the purchaser brought an action against the vendor for the deposit, which was compromised by the vendor repaying the deposit and rescinding the contract. The company filed a bill against the purchaser and some other defendants who had agreed to share with him, for a return of the £75,000 and of the bonds. It was held, (i) that although the financial position of the company might render it convenient to them to rescind the contract, and though they might otherwise have been ready to take the smaller quantity of land, they were entitled to rescind the contract, as the purchaser was unable to complete with them; (ii) that the company were entitled to rescind on the ground of *misrepresentation* though they might have been able to ascertain the extent of the estate; and (iii) that the company were entitled to re-payment of what they had paid, and to a return of the bonds, and that they had a lien on a portion of the £50,000 re-paid to the purchaser, which had been paid into Court. (x)

One of the articles of the contract in the above, provided that the estate as to extent of acreage should be taken to be conclusively shown by certain deeds. Held, that this was merely a conveyancing condition as to identity, and that, coupled with the representation as to the acreage it did not estop the company from rescinding on the ground of deficiency in the acreage. (y)

(x) *Aberman Iron-works v. Westons*, L.R., 4 Ch. 101.

(y) *Per Lord Cairns*, L. C., *Ibid.*, L.R., 4 Ch., at p. 105—8.

The defendant may show that at the time of the execution of the contract, he was under some duress or disability to enter into the bargain, or was fraudulently induced to enter into it, or that the contract is immoral or void on ground of public policy. But a contract legal in its inception can not be rendered illegal by matter *ex post facto*. (2) The defendant may, on the other hand, admit the validity of the original agreement and prove facts constituting a subsequent waiver thereof. A mere verbal waiver of a written agreement is however no defence. Where the agreement and its breach is admitted, a release and satisfaction in writing may be put forward in bar of the suit. (a)

Any person interested in a contract in writing may sue to have it rescinded, and such rescission may be adjudged by the Court in any of the following cases, namely:—(i) where the contract is voidable or terminable by the plaintiff; (ii) where the contract is unlawful for causes not apparent on its face, and the defendant is more to blame than the plaintiff; and (iii) where a decree for specific performance of a contract of sale, or of a contract to take a lease, has been made, and the purchaser or lessee make default in payment of the purchase-money or other sums which the Court has ordered him to pay.

When the purchaser or lessee is in possession of the subject-matter, and the Court finds that such possession is wrongful, the Court may also order him to pay to the vendor or lessor the rents and profits, if any, received by him as such possessor.

In the same case, the Court may, by order in the suit in which the decree has been made and not complied with, rescind the contract either so far as regards the party in default, or altogether, as the justice of the case may require. (b)

Rescission of a contract in writing cannot be adjudged for mere mistake, unless the party against whom it is adjudged can be restored to substantially the same position as if the contract had not been made. (c)

(a) *Shankar v. Bhat*, 1 Macq. H. L. C. 392.

(b) *Shankar v. Bhat*, 1 Macq. H. L. C. 392.

(c) *Shankar v. Bhat*, 1 Macq. H. L. C. 392.

A plaintiff instituting a suit for the specific performance of a contract in writing, may pray for the alternative relief for rescission, that, if the contract cannot be specifically enforced, it may be rescinded and delivered up to be cancelled; and the Court, if it refuses to enforce the contract specifically, may direct it to be rescinded and delivered up accordingly. (d)

On adjudging the rescission of a contract, the Court may require the party to whom such relief is granted to make any compensation to the other which justice may require. (e)

In an open contract, where the parties have not themselves by their stipulations in written contract fixed any time for its entire completion, or for the completion of parts of it in their successive stages, the law says that a reasonable time shall be given for its completion, and for the taking of the progressive steps in it. The payment and the conveyance are concurrent acts; and he who is to sue on a breach of the contract, or claims to be in a position to rescind it, when rescindable, must aver and prove his readiness to do the act on his side, which is to be concurrent with, and is the consideration for the act of the other. (f)

Where a time is fixed by the contract for the delivery of an abstract, and both parties consequently know that the time is so fixed, the purchaser must nevertheless in equity give notice to the vendor, in reasonable time before the day arrives, that he will require the abstract to be then delivered: if he does not give this warning he will not in equity be able to rescind. (g) *The Courts of equity have always been tolerant of slight delays*; since many unforeseen causes, difficulty as to title, or as to money, may occur to the most honest and willing contracting parties. If this be the rule, even where a certain day is fixed and the Court of equity has to struggle against a rule of law, *a fortiori* does it apply to an open contract where no certain time is fixed. (h)

(d) Act I of 1877, sec. 37.

(e) *Ibid*, sec. 38.

(f) *Per FRYER, C.J., McArthur v. Kelsall*, 1 Taylor and Bell's Rep., 186.

(g) *Guest v. Homfray*, 5 Ves. Jun., 818.

(h) *Per FRYER, C.J., McArthur v. Kelsall*, 1 Taylor and Bell's Rep., 187.

If a day is fixed by the vendor for the completion of the contract, and not waived, the buyer must be ready with his money at that day, if the seller is ready to convey. These are concurrent acts, and if the buyer is ready, the bargain could not be avoided, merely because the buyer had previously misrepresented his ability according to the then state of circumstances and probabilities. "Legal fraud, that is such fraud as will defeat a contract, is not identical with moral fraud; every ordinary chanter of the excellence of the thing which he sells, when he makes untrue representations, not amounting to legal warranties, offends against morals. But the rule of law is *Caveat Emptor*; and if a buyer falsely describes his ability, but nevertheless has his money at the day, the contract is not defeasible." (i)

When time is *not* originally made of the essence of a contract for the sale of land, one of the parties is not entitled afterwards by notice to make it of the essence, unless there has been some default or unreasonable delay by the other party (j)

After a delay of two years on the part of a vendor, he gave notice to the purchaser to complete his contract within *three weeks*, and that if he did not do so, the vendor would treat the contract as at an end: it was held that the time limited for completion was under the circumstances, unreasonably short, and the notice, therefore, of no effect. The vendor brought an action claiming a declaration that his contract for sale was at an end. The purchaser made a counter-claim. *Held* that the defendant was entitled to deduct his costs from his purchase-money in priority to a mortgagee of the plaintiff, whose mortgage has been created after the contract for sale, but before the commencement of the action. (k)

When, after a contract for the sale of land has been entered into, a notice is given to make time of the essence of the contract, the question whether the notice is reasonable or not must be judged of as at the date when it is given. (l)

(i) See *Paul, C.J., Abbott v. McArthur*, 1 Taylor and Bell's Rep., 178.
 (j) *Wells v. Hughes*, L.R., 10 Eq., at p. 296.
 (k) *Griffith v. Barry*, L.R., 17 Ch. D., 589.
 (l) *Overton v. Morgan*, L.R., 13 Ch. D., 182.

On avoidance of a contract, the parties are to be put in *status quo* i.e. in the same position as if no contract had ever been made, and when this is no longer possible, there can be no rescission. (m)

If there be a condition that the purchaser shall state his objections to the title within a limited period, and that if the seller shall not be able or willing to remove them, the seller may rescind the contract, that would give to the seller the option expressed; but if the seller express a willingness to remove the objections, he makes his option not to take advantage of the condition, and he can not, at any time afterwards, rescind the contract. (n)

If a party with full information freely confirms a contract, which he was at liberty to rescind, he will be bound by it, and no new consideration is requisite to give validity to the confirmation. (o)

Where a purchaser is entitled to be relieved on the ground of concealment of a fact establishing the invalidity of the title, it is not important that he has not been evicted. If the rightful owner is not barred by adverse possession, though he may never assert his right, the purchaser can not be compelled to remain during the time to run in a state of uncertainty whether, on any day during that period, he may not have his title impeached. A Court of equity is bound to relieve a purchaser from that state of hazard into which the misrepresentation of the seller has brought him. (p)

A purchaser may, of course, have a right to avoid a purchase by matter *ex post facto*, as where the subject of sale was a gentleman's residence and some of the ornamental timber was cut pending an investigation of the title. (q)

A condition in a contract for sale that, if the purchaser shall make any objection or requisition in respect of title or otherwise which the vendor shall be unwilling on ground of expense or

(m) *Taleb Hossein v. Ameer Bux*, 22 W R, 529, *Mahammad Mohideen v. Ottayel Umache*, 1 Mad. H.O., 390.

(n) *Tanner v. Smith*, 10 Sim, 410

(o) *Chesterfield v. Janssen*, 2 Ves, 146, 149, 152, 158, 159. [Eldon..

(p) *Edwards v. M'Leay*, Coop, 308. S.C. 2 Swanst., 287. *Per Lord*

(q) *Magannus v. Fallon*, 2 Moll, 591, Act I of 1877, sec. 24, illus. to cl. (b)

otherwise to comply with, the vendor may annul the sale, does not enable a vendor to rescind the contract in a case where he fails to show any title whatever; and where the purchaser has incurred expense in the investigation of the title and otherwise, the vendor will be decreed to pay damages for breach of the agreement in addition to refund of the deposit. ()

Where, in execution of a decree passed against a person who had previously been adjudicated an insolvent, portions of his property (then vested in the Official Assignee) are attached and sold, the purchaser is entitled to have the sale set aside under sec. 313 of the Code of Civil Procedure, notwithstanding that the Official Assignee acquiesces in the sale, and is content to receive the sale-proceeds. (*) Mr Justice Field in delivering the judgment of the Court observed:—"We think that, at the time of the attachment and sale, this particular property could not be said to have belonged to the judgment-debtor; nor could it be said that he had over that property or the profits thereof any disposing power which he could exercise for his own benefit.....The assent of the Official Assignee can be put no higher than a conveyance by him to the appellant. We think that, as the judgment-debtor had no salvable interest in the property, the appellant (the purchaser) could not obtain any title to the property by virtue of the execution-sale. If, in consequence of the assent of the Official Assignee and his subsequent ratification of the sale, the appellant would have a good title in so far that the Official Assignee might be afterwards estopped from disputing that title, it is clear that this title would be acquired not by reason of the sale, but by estoppel as against the Official Assignee; and we think the purchaser is entitled to exercise his option as to whether he would accept the title which the Official Assignee can give him, and is entitled to say, if he chooses, that he declines to take a title which, notwithstanding the Official Assignee's assent, might afterwards be called in question, on the ground that the Official Assignee had

(*) *Ballard v. Ryland*, L.R., 9 Ch. D., 588.

(*) *Stoddard v. Ryland*, L.R., 9 Ch. D., 217.

no power to allow the sale to stand, or had by doing so, obtained less than the market-value of the property. The real question which we have to decide is, whether under the terms of sec 313 of the Code of Civil Procedure, the person whose property purported to be sold had any saleable interest therein,—that is, at the time of sale; and we think that, in consequence of the vesting order under 11 and 12 Vic, Cap. 21 the judgment debtor had, at the time of the sale, no saleable interest in this property; and therefore under the provision of the section the purchaser is entitled to have the sale set aside. The purchase-money will be refunded to the purchaser.” (t)

RESCISSION FOR MISTAKE.

In the maxim *Ignorantia juris haud excusat*, the word “*jus*” has the sense of general law or private right according to circumstances. Ignorance of particular private rights is equivalent to ignorance of fact (u). When the word “*Jus*” is used in the sense of denoting a private right, the maxim *Ignorantia juris non excusat* has no application. Private right of ownership is a matter of fact, it may be the result also of matter of law; but if parties contract under a mutual mistake or misapprehension as to their relative and respective rights, the result is that the agreement is liable to be set aside as having proceeded upon a common mistake. A contract to purchase one’s own property is *naturali ratione inutilis* and is therefore void in equity for want of consideration. (v)

A mistake as to the subject-matter of a contract is of three descriptions. It may be a mistake as to the *existence* of the property agreed to be sold, or a misapprehension as to the *identity* thereof. Again it may have reference to the *quantity* or *quality* of the land or tenure forming the subject of sale. Where mistake is a special ground for relief, the right to such relief is lost by negligence. Persons who enter into contracts are presumed to know the law of the land. Mistake of law is taken to be the result of negligence, but the presumption may be rebutted by

(t) I.L.R., 9 Cal., at pp. 219—20.

(u) *Bingham v. Bingham*, 1 Ves. Sr., 126

(v) Per Lord WESTBURY in *Cooper v. Phibbs*, L.R., 2 H.L., 149 & 170.

special circumstances, *v. u.*, by showing the law to be doubtful at the time. But where the mistake is a mutual one of fact, negligence is no bar. The Indian Contract Act 1872, provides that a contract is not voidable because it was caused by a mistake as to any law in force in British India; but a mistake as to a law not in force in British India has the same effect as a mistake of fact. (*v*)

Where both the parties to an agreement are under a mistake as to a matter-of-fact essential to the agreement, the agreement is void. (*a*) The forms they have gone through are inoperative, inasmuch as the parties were never *ad idem* and their minds never met. "It is essential to the creation of a valid contract that both parties should agree to the same thing in the same sense." A being entitled to an estate for the life of B, agrees to sell it to C. B was dead at the time of the agreement, but both parties were ignorant of the fact. The agreement is void. (*y*) An erroneous opinion, however, as to the value of the thing which forms the subject-matter of the agreement, is not to be deemed a mistake as to a matter-of-fact.

A contract is not voidable merely because it was caused by one of the parties to it being under a mistake as to a matter-of-fact. (*z*)

Where the purchaser has by mistake given an unreasonable price for the estate, the Court will in a proper case of fraud or imposition being made out wholly rescind the contract. But the purchaser's mistake must not be due to his own negligence. If a party be entitled to come in to Court to rescind a contract for sale not completed by conveyance, on the ground of mistake, he must not be guilty of *laches* or delay after the mistake is discovered. Where a purchaser by mistake bid for a wrong estate at an auction-sale, it was held that, as he never meant to enter into the contract, it would not be equitable to compel him to perform it, whatever may be his liability in damages at law. (*a*)

(a) Act IX of 1872, sec. 21.

(y) *Ibid.* sec. 20.

(z) *Ibid.* sec. 22.

(a) *Ibid.* sec. 22.

(c) *Indian Contract Act, 1872, sec. 22.*

Where a piece or parcel of land not in the contemplation of the parties, is included by mistake in the description of a property sold by auction, the purchaser is not entitled to a conveyance of such piece or parcel. (b) The Court will not hold the plaintiff bound by the defendant's acceptance of a supposed offer which was never really made, nor yet require the defendant to accept the real offer which was *never* effectually communicated to him, and which he perhaps would not have consented to accept; but will put the parties in the same position as if the original offer were still open. (c) Where the Court comes to the conclusion that the parties did not rightly understand each other, "it is not possible without consent to make either take what the other offered." (d)

Mistake as to price can arise only when there is an unqualified acceptance of an erroneously expressed or understood proposal. If the proposal is misunderstood by the acceptor, it is for him to show that the misunderstanding was reasonable. If, on the other hand, the proposal is by accident wrongly expressed, the proposer must show that the acceptor could not reasonably have supposed it in its actual form to convey the proposer's real intention. (e) In *Webster v. Cecil* (f) the defendant sent a written offer to sell property and wrote £1,250 for £2,250 by a mistake in a hurried addition of items performed on a separate piece of paper, kept by him, and produced to the Court. On receiving the acceptance he discovered the mistake and at once gave notice of it. Under the circumstances specific performance was refused.

The Plaintiff sold to the defendant a field containing a well. Tax was payable to government on the field as well as a tax on the well. The deed of sale expressly provided for the payment of the tax on the field by the defendant, but was silent as to the tax on the well. Government recovered the amount of the tax on the well from

(b) *Calverley v. Williams*, 1 Ves. Jun., 210.

(c) Pollock's Principles of Contract, 3rd Ed., at p. 445.

(d) *Oliver v. Higginson*, 1 Ves. & B., 524, 585.

(e) Pollock's Principles of Contract, 3rd Ed., pp. 449—50.

(f) 20 Beav., 62.

the plaintiff for 1871, as the well stood entered in the government-books in the plaintiff's name. The plaintiff sued to recover the amount from the defendant. It was held by the Bombay High Court that unless the sale certificate and indent was not liable to compel use the plaintiff was not paid to him to government; and that if the plaintiff had been led of sale, to provide for the payment of the tax on the well by the defendant, should have arisen from a mistake his only remedy was a suit for reforming the deed so as to make it accord with the actual agreement between the parties at the time of sale (a)

Where by mistake a part only (5 biggas) of the premises intended to be mortgaged is described in the boardman's deed, and would alone pass to the auction-purchaser under bill of sale in execution of the decree upon such mortgage, it was held the Court ought to interfere for the rectification of the instrument, and that regard being had to the intention and subsequent dealings of the agreeing parties, it ought to be construed as if it had expressly and fully mortgaged and conveyed the entire premises in question.

Where a piece of land is held partly (5 biggas) by a permanent lease and partly (8 biggas) by an *amulnāmā* granted almost simultaneously and intended eventually to be changed for a lease, and thereupon the whole piece of land is thrown into one compound, and occupied, and new buildings are erected thereupon with the consent of the lessor, and there is no failure on the part of the lessee to comply with the terms of the grant, it was held that the permanent grant is to be impliedly extended to the entire premises (13 biggas) in question, notwithstanding that no lease was formally granted with respect to the remaining portion as originally contemplated (h)

RESCISSION FOR MISDESCRIPTION.

Merely inaccuracy of language or misdescription will not vitiate a sale-certificate. The intention of the parties must be looked to. (i)

(a) *Shree Ganga v. Dada Bhai*, 10 Bom. H.C.R., 51.

(h) *Shree Ganga v. Dada Bhai*, 10 Bom. H.C.R., 51.

(i) *Shree Ganga v. Dada Bhai*, 10 Bom. H.C.R., 51.

Although *jura demonstratio non nocet*, nevertheless too much care cannot be bestowed upon the description of the parcels, "particularly when the property has not been dealt with for some years, and changes have taken place rendering a new description necessary." When there is a plan, it should be very accurate. If more is comprised in it than the vendor intended to be included, the deed will be rectified, the purchaser having the option of having the contract annulled. (j) A misleading statement or omission made by mere heedlessness or accident may deprive a vendor of his right to specific performance, even if such that a more careful buyer might not have been misled.

Knowledge by the purchaser of the circumstances of the property sold makes an exception to the general rule that a misdescription vitiates the sale, and specific performance may be decreed with or without abatement of price, notwithstanding the misdescription (k) Where a purchaser is personally acquainted with the real state of property sold, he cannot, on account of a circumstance of which he was all along perfectly aware, and which was patent, either reject the contract, or demand an abatement of price. (l) Misdescription is not a good plea in the mouth of a defendant when he is not in fact misled by the description. (m) If, therefore, the purchaser was aware of the nature and quality of the property at the time of his purchase, a mere misdescription in the contract or conditions of sale will not entitle him to an abatement of the purchase-money by way of compensation. The rule is based upon the principle of *caveat emptor*.

The purchaser will be entitled to compensation for a deficiency in quantity, where a certain sum is named and the estate is at the same time professedly bought at so much per *highe*,—or where the quantity is stated, and there is nothing to rebut the ordinary presumption that the price was paid with reference

(j) *Harris v. Pepperell*, L. R., 4 Eq., 1; *Lyle v. Richards*, L. R., 1 E. L. 222. Pollock's P. of Contract 3rd Ed., p. 510. [5 Hare, 298.

(k) *Dyer v. Hargrave*, 10 Ves., 505. *Lord Brooke v. Rounthwaite*,

(l) *Osley v. Gadsden*, 34 Beav., 415.

(m) *See also* *Barrett v. Barrett*, 9 E. L. R., 141.

to the quantity. By the English law, where part of the land agreed to be sold turns out to be the property of a stranger, so that the vendor can not give the purchaser possession of it, the latter is, generally speaking, entitled to enforce the performance of the rest of the contract, with a proportional abatement of the purchase-money (n)

Where lands claimed under a certificate of sale as being in one village, are found to be in another, it is open to the plaintiff to show that there has been a misdescription, and that although the name of the former was used, the intention was to convey the lands he claimed situated in the latter. (o)

A party who buys a specified taluk with the additional description that that taluk contains so much land, gets the whole land which the specification of his vendor covers and which was intended to be sold, although it may be more than was contained in the additional description. (p)

An ambiguous description in a mortgage must be taken most strongly against the mortgagor, the party who conveys the property. Sir Richard Couch in giving his reason for this rule said :—"If the description is ambiguous, it must be taken most strongly against the mortgagor, the party who conveyed the property. He cannot take advantage of the ambiguity and say that this property did not pass, if the description was sufficient to pass it." (q)

The defendant who for twelve years had occupied land as tenant, purchased it at a sale by the Receiver, but refused to complete the purchase on the ground of material misdescription in the advertisement of sale, in that a road and ghat, comprised within the boundaries mentioned in the advertisement, were not the property of the parties whose land the Receiver purported to sell, and also that, to make up the quantity of land as stated in the advertisement, viz., twenty

Macpherson's Law of Contracts, p. 117.

Shri Parashad Sircar v. Shri Parashad Sircar, 12 W.R., 483.

Shri Parashad Sircar v. Shri Parashad Sircar, 14 W.R., 117.

Shri Parashad Sircar v. Shri Parashad Sircar, 18 W.R., 63.

bighās by estimation, lying between high and low water marks had been taken into calculation. The owners of the property sold having brought a suit against the defendant for specific performance, the defendant contended that the Receiver was a necessary party to the suit, and that the sale had been rescinded by a statement of the Receiver that he would forfeit the deposit in the event of the defendant not carrying out his contract. In support of his objection to quantity, the defendant relied on on a Collectorate chitta as showing that the area of the land sold was only 9 bighās, 8 kâtās, 10 $\frac{3}{4}$ chittāks; the same chitta, however, in giving the eastern boundary of the property, described it as lying "on the west of the low-water of the Gangā" *Held*, that there had been no rescission of the contract; that the plaintiffs, being owners of the land down to low-water mark, were entitled to all subsequent accretions, and were, therefore, entitled to include in their measurement all land down low-water mark; and having regard to the fact that the defendant was personally acquainted with the property sold, it was not open to him to repudiate the contract on the ground of misdescription. The plaintiffs were entitled, therefore, to a decree for specific performance. (r)

A purchaser is entitled to recover part of his purchase-money when the property has been misdescribed unintentionally. (s) A conveyance of too much may be rectified after the purchaser has entered into possession. (t)

The specification in a sale-deed of land, of the area of the land sold *prima facie* implies that the area was regarded as material by the parties, and unless it is clear that the precise area was not regarded as material. Proportional compensation will be awarded to the purchaser of land, the real area of which is found to fall short of the area specified in the deed of sale. (u) In *Suleman Vadu v. Trimbakji Velji* it was contended on behalf of the vendor (appellant) that the mention of the area where

(r) *Gungadhar Surkar v. Kasi nath Biswas*, 9 B L.R., 128

(s) *Dart's V. & P.*, 5th Ed., 124, 597.

(t) *Garrad v. Frankel*, 30 Beav., 445. See also Act I of 1877, sec 31.

(u) *Suleman Vadu v. Trimbakji Velji*, 12 Bom. H.C.R., 10.

the boundary was given was mere surplusage, while the purchaser (respondant) insisted that what he contracted to purchase was 30 acres at Rs 500 per *bighá* and this he did not get. Mr. Justice West in delivering the judgment of the Court said:—“The land sold is described in the conveyance as containing 30 acres. It appears to have contained only 19 acres. This is a very material discrepancy; but it is said that the specification of the area following the statement of the survey-number and boundaries was a mere matter of description, and that an error in this respect after the transaction had been completed, affords no ground for compensation. No case precisely on all fours with the present one has been cited to us from the English reports. In *Whittemore v. Whittemore*, (v) there was an express provision against annulment and for compensation in case of misdescription. The question was whether the operation of this condition was excluded by another which in terms excluded compensation on account of any error as to quantity. Those cases in which a deed, failing to express the real intention of the contracting parties, has been relieved against, rest on a principle not quite applicable to the one we have to deal with. The question seems to be whether the area of the field, as specified, was an essential part of the consideration for the payment made by the plaintiff, or whether, although the area is set down as matter of description, he bought and took the field as a particular object identified and estimated for the purpose of the contract independently of the circumstance of its area being or not being so much as 30 acres. *Prima facie* the specification of the area implies, we think, that the area is regarded as material by the parties, and is the quality, or one of the qualities, specially had in view as the basis of their contract.....The principle of proportional compensation appears to be founded on justice, and to be the one which should be applied in all such cases, except where it is clear that the precise area was not regarded as material.” (w)

Section 5.—Of Refund of Deposit or Purchase-money.

A person who purchased joint-family property without notice that there were contested rights, and in the belief that the vendor was entitled to sell or grant a *maumusi* lease, was held entitled, when a third party came forward and claimed the property, to recover the purchase-money, unless bad conduct or bad faith could be brought home to him. (a)

In a suit by a purchaser of immovable property to recover a deposit, paid by him on account of the purchase-money to the auctioneer, the vendor having refused to convey to the purchaser, same by a deed, which should describe the premises by reference to another deed, not shown to the purchaser at the auction, and of the contents of which he had not then any notice: *Held* (1) that the purchaser was *not* bound to have tendered a conveyance engrossed to the vendor for execution, together with the residue of the purchase-money, before suing to recover the deposit; and (2) that the money having been deposited with the auctioneer as a stakeholder, and being in his hands, the action to recover it lay against the auctioneer, and not against the vendor. (y)

Where a solicitor acting for a vendor receives the deposit on the sale of an estate, the law will not imply, as in the case of an auctioneer, that he receives it as stakeholder. If he professes to receive it as agent for the vendor he is bound to pay it over to him on demand. (z)

The defendant having executed a voluntary conveyance, agreed to sell the property comprised in it to the plaintiff, who paid a deposit, the plaintiff refused to accept the title, and sued for the deposit. *Held*, that the defendant (vendor) could not make a good title, *first* because the voluntary conveyance might have since been confirmed by a consideration, and its invalidity therefore depended on a doubtful state of facts; and, *secondly*,

(a) *Rakhai Chunder Chowdhry v. Gopal Krishna Sen*, 25 W. R., 368—70.
(y) *Besaji Adami v. Bhinji Furshotam*, 4 Bom. Rep., O.C.J., 125.
(z) *Edgell v. Day*, L. R., 1 Q. P., 80.

because the defendant could not compel the plaintiff to concur in defeating the previous conveyance, and making a good title to himself; and that the plaintiff was, therefore, entitled to recover the deposit. (a)

The plaintiff agreed to purchase land and paid down the purchase-money, taking from the vendor an agreement that if he did not register the conveyance, he would return the purchase-money. The plaintiff entered into possession; but the vendor failing to register the conveyance, he sued to recover back his purchase-money. *Held*, that he was entitled to a refund of the purchase-money. The purchaser who had obtained possession might or might not, according to the particular circumstances of the case, be liable to pay the vendor a reasonable amount for the use and occupation of the land; but when no set-off is pleaded, the vendor could only claim such amount by a separate action. (b)

In cases where sales of ancestral property by a Hindu co-parcener, are set aside at the suit of another co-parcener, the latter can only be compelled to refund the money, if it can be satisfactorily shown that it went in to the joint-family estate. (c)

If the failure of consideration results from the default of the purchaser himself, he is not entitled to recover, for there is nothing inequitable in the defendant retaining what has been paid him under the contract. Thus a purchaser who has paid a sum by way of deposit and afterwards fails to complete, cannot recover the sum as received to his use by the defendant. (d)

Where a purchaser, after depositing earnest-money for the purchase of land, does not complete the purchase, he is bound to show that he has an equitable right to have back the money. But for the forfeiture of the earnest-money, the vendor can justly sue for damages to the extent of the loss incurred by a second sale to another person. D contracted to sell to P three lots of land for Rs. 2,500, of which he received Rs. 700 as earnest-money.

Where a sale by two co-parceners in favor of another was set aside, on the ground that the sale by a co-parcener without the consent of the others was illegal,—It was held on the suit of the vendee to recover the purchase-money from the descendants of the vendors, that the purchase-money was like a debt, and payable by the heir, in proportion to the shares inherited by each. (j)

The vendor of certain land agreed in the conveyance which was registered, that, in case the land actually conveyed proved to be less than that purporting to be conveyed, he should make a refund to the purchaser of the purchase-money in proportion to the value of the quantity of land deficient.

Agreement by vendor to refund purchase-money in case land sold proved deficient in quantity.

The land actually conveyed having proved to be less than that purporting to be conveyed, and the vendor having failed to make a refund of the purchase-money in proportion to the value of the quantity of land deficient, the purchaser sued the vendor for the value of the quantity of land deficient. It was held by the Allahabad High Court, that the agreement being in writing registered, the limitation of 6 years provided by art. No. 116, sch. II., Act XV of 1877 was applicable to the suit. (k) Mr. Justice Spankie in delivering his judgment in the case observed as follows :—“The three contingencies set forth in the contract of sale were foreseen or anticipated by both parties, and with regard to two of them, deficiency of rental and deficiency in the quantity of land, provision was made for a refund or abatement of the purchase-money in proportion to the loss that might be discovered. There is no question here of voiding a contract at the option of one of the parties on the ground that his consent was obtained by misrepresentation, nor there is any demand on the part of a party whose consent was caused by misrepresentation that a contract shall be performed, and that he shall be put in the position in which he would have been, if the representation had been true. Nor is it the case of a party who finds that his vendor had not

(j) *Omedee v. Cheda hall*, 2 Agra Rep., A.C., 264.

(k) *Kishan Lal v. Kinkack*, I.L.R., 3 All., 712.

the entirety of the estate which he professes to sell, and who refuses to accept at a proportionate abatement the quantity of land which the vendor really owns and has to sell. Nor again is the plaintiff here, after discovery of the deficiency in the quantity of land sold, exercising any election and offering to take his vendor's interest in the estate, subject to a proportionate reduction in the amount of sale-consideration. But the parties have provided for a deficiency, either suspected or known to both of them to be likely to happen, and it is one of the conditions of the sale-contract, that, if it ever happened, there will be a refund of a proportionate amount of the purchase-money. There is no pretence of any consent to the contract of sale induced by misrepresentation. In their plaint they sue to recover the money claimed by enforcing the conditions of the contract. The refund of the 'purchase-money' on the happening of the contingencies provided for in the deed of sale must be regarded as compensation for the deficiency. The sale to the purchaser is maintained, but when it appears that there is a deficiency in rental or quantity of land sold, he is entitled to satisfaction and an equivalent for the deficiency. The terms of the deed may call it a refund of purchase-money, or a proportionate reduction in the amount, or an abatement, of the purchase-money, but it is in fact compensation; and by the deed itself, if there prove to be a deficiency in the quantity of land, not only is a proportionate amount of the purchase-money, *i.e.* the value of the land deficient, to be paid to the vendees, but they are to have any costs of Court and interest at 12 per cent. It would seem then that the claim here is one brought into Court, because the defendant refuses to fulfil the conditions of the contract and to make good to the plaintiffs the loss they have sustained. Had the defendant paid the value of the land that is deficient, or refunded to the purchaser on account of purchase-money proportionate to decrease in the rental, there would have been no need of this suit. The plaintiffs are compelled to sue because the defendant has broken the promise which is the agreement⁴ in the conditions of sale. Under these circumstances

art 65, sch. ii of Act XV of 1877, appears to be applicable,—For compensation for breach of a promise to do any thing at a specified time, or upon the happening of a specified contingency.

“In this case the vendee could not have repudiated the sale, as he had accepted the promise of the vendor to make good by a money-compensation any deficiency as to the quantity of the land sold. When he receives the compensation promised, the consideration has not failed. The vendor retains the purchase-money and the vendee retains the land. The consideration would fail if the deficiency in the rental and quantity was so large that the vendor had nothing at all left to sell. After full consideration it appears to me that art. 65 applies. The agreement is made of several promises and every promise is in itself an agreement, and with regard to a deficiency in the rental, it is provided that, if it is discovered at the time of making collections from the tenants, ‘then the vendor should refund to the vendee so much out of the purchase-money as would be proportionate to the decrease.’ In regard to a deficiency in the quantity of land the provision is:—‘Should there arise any deficiency or defect in the quantity sold, the vendor shall stand responsible for the same: that in case of there being deficiency in the share sold, the vendor shall pay to the vendees the value thereof, with the costs of Court and interest of one per cent.’ But if art. 65 applies, the limitation begins to run when the specified time arrives, or the contingency happens, and the ordinary limitation would be three years. But the promise is recorded in writing registered, and limitation is extended by art. 116 to six years. This is settled by the Full Bench decision of this Court in the case of *Husain Ali Khan v. Hafiz Ali Khan*. (l) This being so, the suit cannot be said to be barred by limitation, and the plaintiffs were entitled to have it tried on the merits, the suit having been instituted within six years of the date of the execution of the original deed of sale, and therefore of the discovery of the deficiency.” (m)

(l) L. L. R., 3 All., 600.

(m) *Krishan Lal v. Kinjoch*, L. L. R., 3 All., 714—17.

Where a minor on coming of age sues to set aside a sale, he is bound to refund the purchase-money, when his estate has benefited by it, or to hold the property charged with the amount of debt from which it has been freed by the sale. (n)

A contract to buy one's own property is a *nudum pactum*. In *Bingham v. Bingham* (o) a sale by the defendant to the plaintiff of an estate which was already his own was set aside, and a return of the purchase-money was decreed upon the ground of mistake. A man cannot buy what is already his own, for there is a total failure of consideration in such a case,—“the vendor receiving, and the purchaser paying money without the intended equivalent.” (p)

The defendants, after purchasing a patni-tâluk at an auction-sale for arrears of rent under Regulation VIII of 1819, granted a darpatni-lease to the plaintiffs the former darpatnidârs, and received a bonus of Rs. 1,199. The auction-sale was set aside five years afterwards. The darpatni-lease, for which they paid the premium of Rs 1,199 contained a stipulation, that if the patni-tenure should at any time lapse through the default of the defendants, the bonus should be refunded by them to the plaintiffs. In a suit brought for the refund of the bonus upon the auction-sale being set aside, the plaintiffs were held entitled to a refund of the bonus, although they had not been dispossessed, but had simply reverted to their former position as darpatnidârs under the former patnidâr. (q) Mr. Justice Jackson in delivering judgment in the case observed:—“Now, putting aside the fact that deeds in this country are not prepared with the assistance of attorneys or counsel, and that we are not necessarily bound to draw the same inference from stipulations or omissions here as we should draw in England, it seems plain enough that the parties in this case sought to provide for the

(n) *Mt. Bukshun v. Mt. Dulhin*, 12 W. R., 337; *Bai Kesar v. Bai Ganga*, 8 Bom. H.C. Rep., A. C. 81; *Mirza Pana Ali v. Saiad Sadik Hossein*, 7 N.W.P. H. C. Rep., 201. For an extreme case see *Makundi Lal v. Kaunsila*, 1 L. R., 1 All., 568. (F.B.) See ante pp. 224—27; 296, (n).

(o) 1 Ves. Sr., 126.

(p) *Stewart v. Stewart*, 6 Cl. & F., at p. 969. See also *Jones v. Clifford*, L.R., 3 Ch. D., 779, 791. See ante p. 461, (u) and (v).

(q) *Tara Chand Biswas v. Ramgobind Chowdhery*, I.L.R., 4 Cal., 778.

consequence of any act of bad faith as between the grantor and the grantee. It may be that they overlooked the fact that the Law already provided sufficient protection, but at any rate they thought it advisable to insert this stipulation, and it was accordingly inserted. What has occurred in this case, however, is an accident of a different kind. No bad faith is imputed to either party, but the *vis major* of the Court has been called into exercise, and the transaction has proved altogether void. The defendants have been indemnified for their loss upon the auction-sale being set aside, and they ought, upon principles of equity and good conscience, to be compelled to refund to their grantees, the plaintiffs, the amount paid by them as premium." (r)

Where the original owner in the case of the sale of his estate for arrears of revenue, where no such arrears exist, sues to recover possession and obtains a decree, the decree is sufficient for the purposes of sec. 34, Act XI of 1859, without a special declaration that the sale is annulled ; and the order for refund of the purchase-money must be made in the execution of the decree. (s)

Fraud and misrepresentation are invariably good grounds for an action for refund of the purchase-money. Where fraud on the part of the vendor has been substantially alleged in the plaint, the absence of a stipulation to refund either in the contract or in the conditions of sale did not protect the vendor from refunding the deposit or purchase-money. (t)

Where a vendor of a house, knowing of a defect in the main walls, plastered it up, and papered it over for the purpose of concealing it from the purchaser, it was held to be a direct fraud, which avoided the contract for sale, and enabled the purchaser to recover back the purchase-money. (u)

(r) I.L.R., 4 Cal., 781—82.

(s) *Sreemunt Lal Ghose v. Shama Sundari Dasi*, 12 W.R., 276.

(t) *Raja Nilmoney Singh v. Gordon, Stuart & Co.*, 9 W.R., 371.

(u) *Shirly v. Stratton*, 1 Bro. C.C., 440; *Schneider v. Heath*, 3 Camp., 505. See also as to active concealment, Act IX of 1872, sec. 17, cl. (2).

Section 6.—Of Damages for Breach of Contract.

When a contract for sale is broken from bad faith, the party breaking it should be accounted a wrong-doer and made to pay for all the injury which he occasions. (v)

The Indian Contract Act provides that when a contract has been broken, the party who suffers by such breach is entitled to receive, from the party who has broken the contract, compensation for any loss or damage caused to him thereby, which naturally arose in the usual course of things from such breach, or which the parties knew, when they made the contract, to be likely to result from the breach of it. Such compensation is not to be given for any *remote* and *indirect* loss or damage sustained by the reason of the breach. (w)

Where a vendor sold and conveyed certain property to a purchaser as freehold, and the same turned out to be all copyhold, the purchaser was held entitled to have the sale set aside and the purchase-money repaid to him with interest and the costs attending his purchase, but not to damages in respect of an attempted re-sale, as being too remote. (x)

Where a vendor having agreed to convey, without any reasonable excuse conveys the property to a third party in order to obtain a higher price, the vendee is entitled by way of damages to the additional price obtained by the sale. (y) The Calcutta High Court (McDonnell and Field J. J.) in laying down this rule as to measure of damages said: "There are *three* classes of cases in which damages are claimed for breach of agreement to convey. The *first* class is where the owner of the property, believing that he has a good title agrees to convey, but when the title comes to be investigated,

(v) *Per* McDONNELL and FIELD, J. J., *Trailokya N. Biswas v. Joykali Chowdhraïn*, 11 Calc. L.R., at p. 461.

(w) Act IX of 1872, sec. 73.

(x) *Hart v. Swaine*, L.R., 7 Ch. D., 42.

(y) *Trailokya N. Biswas v. Joykali Chowdhraïn*, 11 Calc. L.R., 454.

it turns out that there is some flaw, in other words, the title is not one which he can compel the purchaser to accept. The *second* class of cases is where a person who knows that he has no title, or is aware of a fatal defect in his title, notwithstanding this makes an agreement to convey: and the *third* class of cases is where a person having agreed to convey and the title being unimpeachable, without justifiable excuse through caprice or because he finds a better bargain, refuses to carry out his agreement. The present case falls we think within the third class.....and we think in a case of this kind where the vendor having agreed to convey without any reasonable excuse conveys the property to a third party merely for the purpose of obtaining more money, it is not reasonable to allow him to retain the benefit which he has obtained by this breach of good faith." (z)

Where a contract goes off in consequence of a defect in the vendor's title, the purchaser is not entitled to damages *for loss of the bargain*. (a) This rule of law was adopted and affirmed by the House of Lords in *Bain v. Fothergill*. (b) "If a person," said Lord Chelmsford, "enters into a contract for the sale of real estate, knowing that he has no title to it, nor any means of acquiring it, the purchaser cannot in an action for breach of the contract, recover damages beyond the expences he has incurred. Any other damages must be the subject of an action for deceit." The rule, however, does not apply, where the breach of contract arises from some cause other than the inability of the vendor to make out a good title, (c) nor to the case of a lease granted by one who has no title to grant it. A was in possession of premises under a lease from B, which would expire on the 4th of December, 1864. In February 1860, A, in consideration of a premium of £400, obtained from B a further lease of the same premises for twenty-one years and twenty-one days to commence on the expiration of the former lease. On the

(z) 11 Cal. L. R., at pp. 460—61.

(a) *Mureau v. Thornhill*, 2 W. Bl., 1078.

(b) L.R., 7 H.L., 158.

(c) *Engell v. Fitch*, L. R., 4 Q. B., 659.

death of B in 1863, it was found that B was only tenant for life, with power to grant leases *in possession*, and not in reversion and consequently that the lease so granted by him to A in February 1860, was void. A thereupon obtained from the reversioners a fresh lease for seven years, at a considerable increase of rent, and sued C (B's executor) upon the covenant for quiet enjoyment contained in the void lease. It was held that A was entitled to recover, besides the £400 premium which he had paid to B, and the costs of preparing the void lease, the value of what he had lost by B's breach of contract,—substantially the difference between the value of the term professed to be granted to him by the lease of February, 1860, and that of seven years' term which he obtained from the reversioners. (d)

The defendants, mortgagees of a house with a power of sale, sold it by auction to the plaintiff, the particulars of sale stating that possession would be given on completion of the purchase. The plaintiff soon afterwards contracted for a resale at an advance of £105. On investigation the title was found satisfactory, but on the plaintiff requiring possession before completing the purchase, it appeared that the mortgagor was in possession and refused to give it up. The defendants were in a position to have ousted him by ejectment, but they refused to complete the sale. On this the plaintiff brought an action for breach of the contract of sale:—*Held* that as the breach of contract arose, not from the inability of the defendants to make a good title, but from their not having taken the necessary steps to secure the possession, the case did not come within the principle of *Flureau v. Thornhill* (2 W. Bl. 1078); the plaintiff was entitled to recover not only his deposit and the expences of investigating the title, but also damages for the loss of his bargain; and that the measure of damages was the difference between the contract-price and the value at the time of the breach of contract; and that the profit which it was shown the plaintiff could have made on a resale, uncontradicted by other evidence, was evidence of

Damages for Vendor's unwillingness to remedy a defect in the title.

(d) *Lock v. Furze*, L.R., 1 C.P., 441.

this enhanced value, and that the plaintiff was therefore entitled to recover the £ 105. (e) As a rule the vendor cannot in equity be allowed to take advantage of his own wrong.

By the conditions of sale it was provided as follows.—“Should the purchaser neglect or fail to comply with any of the above conditions, his deposit-money shall be absolutely forfeited to the vendor, who shall be at liberty to resell the property by public auction or private sale; and if the amount or price which shall be obtained by such second sale shall not be sufficient to cover the amount bid for the same at the present sale and all the expences of or incidental to the present sale, the deficiency shall be paid by the defaulter to the vendor.” The

Damages for Purchaser's default, purchaser paid a deposit, but failed to complete the purchase. There was no resale: it was held that the vendor was entitled to retain the deposit, and also to recover the auctioneer's charges for the abortive sale, and the costs incurred by him in preparing to complete the sale. (f)

If pending a suit for specific performance, the seller dispose of part of the property, *e. g.*, stone in a quarry, the Court will take care, that the purchaser if he succeed in the suit have full compensation for the damage which he sustains by the seller's act. (g)

Where a purchaser is entitled to special damages, the price at which the vendor has re-sold the property has been held *prima facie* proof of its market value. (h)

In an action against a vendor of land for breach of contract in not completing the purchase, interest on the deposit-money may be recovered as special damage for the loss of the use of the money (i)

Where the parties to a contract stipulate for the payment of a specified sum for any breach of it, and the damages resulting from any such breach are uncertain and incapable of

(e) *Engell v. Fitch*, L. R., 3 Q.B. 314; 4 Q.B. 659. See as to Vendor's bad faith, *ante* pp. 477—78.

(f) *Daniel v. Essex*, L.R., 10 C.P., 538,

(g) *Nelson v. Bridges*, 2 Beav., 239

(h) *Godwin v. Francis*, 33 L.J., C.P., 221.

(i) *Maberly v. Robins*, 5 Taunt., 626.

accurate valuation, the sum agreed to be paid will be treated as liquidated damages and not as penalty. A plaintiff who sues for damages, and is entitled to them, cannot likewise be entitled to specific performance, or to an injunction against the further breach of the agreement. (j)

A party failing to perform his contract may be sued, at pleasure of the other party, either for specific performance or for damages. (k) In a suit for breach of contract, it is open to the defendant to plead in that suit—without being obliged to bring a fresh suit—that the plaintiff, being first to break the agreement, cannot now sue for damages for something subsequently done by the defendant in contravention of it. (l)

When a contract for sale has been broken, if a sum is named in the contract as the amount to be paid in case of such breach, the party complaining of the breach is entitled, whether or not actual damage or loss is proved to have been caused thereby, to receive from the party who has broken the contract reasonable compensation not exceeding the amount so named. (m) But an intending purchaser is not entitled to compensation under this statutory provision (simply because the kabâlâ or conveyance has not been executed within the stipulated date), unless he can show that he did all that he was bound to do, that he tendered the purchase-money together with a draft of the kabâlâ or conveyance to the vendor, who then refused to execute it. (n)

The registration of a deed of agreement to sell at some future period is optional. (o) The want of registration of a contract by A to sell land to B at some future time on receipt of balance of sum agreed on, not then paid, is no bar *per se* to B's preferential claim over C, a

- (j) *Mt. Ashrufoomissa Begum v. Stewart*, 7 W.R., 303.
 (k) *Nagendra Chander Mitter v. Kishen Soondari Dassie*, 19 W.R., 132 (P.C.); *Munee Dutt Sing v. William Campbell*, 12 W.R., 149.
 (l) *Mt. Ashrufoomissa Begum v. Stewart*, 7 W.R., 303.
 (m) Act IX of 1872, sec. 74.
 (n) *Fuleer Ahmed v. Issur O. Doss*, 20 W. R., 481. See *post*, p. 504.
 (o) Act III of 1877, sec. 18, cl. (b); 3 W.R., 104; 15 W.R., 355.

subsequent purchaser with notice whose sale has been registered. (p) But if C purchased in good faith and without notice and is in possession, his possession cannot be disturbed in consequence of A's non-fulfilment of his contract with B, but B's remedy is not by a suit for specific performance of contract, but by an action for damages. (q)

Where the executants of a conveyance (kabâlâ) omitted to have it registered, and the property was sold to a third party who took it *bonâ fide* for valuable consideration, the remedy of the party in whose favour the kabâlâ was executed as against the executants was held to be, not in a suit for specific performance, but in an action for damages. (r)

The defendant bought a house belonging to the plaintiff, and standing in his own land, on the condition that, as long as the house was not removed, he would pay the plaintiff a certain sum per month. The house not having been removed the plaintiff sued for the stipulated sum from the date of purchase. Held this was not an action for rent, but a suit for liquidated damages. (s)

Section 7.—Death, Insolvency &c. of Contracting Parties.

An offer to sell land, to be binding upon the person making it, must be accepted within a reasonable time : and if the person making the offer die, become insolvent or sell, before the acceptance of the offer, the land is not bound. (t)

The rights of vendor and purchaser *inter se* are not affected by the death, insolvency or lunacy, of both or either of the parties before the time fixed for completion. (u) Under the Indian Contract Act, promises bind the representatives of the promisors in case of death of such promisors before performance,

(p) *Shib Kissen Doss v. Shaikh Abdul Sobhan Chowdhry*, 3 W.R., 103.

(q) *Ramtonu Surmah v. Gour Chunder Surmah*, 3 W.R., 64.

(r) *Nand Kishore Lall v. Mohun Lall*, 22 W.R., 164.

(s) *Debnath Roy Chowdhry v. Kallykisto Roy Chowdhry*, 1 W. R., 2.

(t) *Bhayankare Debba v. Tarini Charan Chuckerbutty*, 7 W. R., 38.

(u) *Dart's V. & P.*, 5th Ed., p. 253.

unless a contrary intention appears from the contract. (c) Heirs of the deceased, executors of testators, administrators of intestates, committees of lunatics, and assignees of insolvents, are all representatives within the meaning of the Act.

But the liability of representatives to answer in damages for breach of a contract, is limited to the extent of the assets, real and personal, which come to their hands, and the rule is the same in the Hindu and the Mahammadan law. (d)

Where a person being a member of a Mitaksharā joint family contracts to sell his share of the joint ancestral estate, but dies before the execution of the conveyance, the bare contract passes nothing to the purchaser, who cannot enforce it against the co-partners taking by right of survivorship. (e)

The performance of her husband's contracts is strictly enjoined on the Hindu widow where such husband is not a member of an undivided family. (f) Under the Dayabhāga in Bengal the Hindu widow, in the absence of lineal male descendants, fully represents her husband's estate even in an undivided family.

Section 3. - Of Preliminaries before Completion.

A buyer of lands places himself in a position of risk who has the same attorney with the vendor: for the risk attendant on such a state of things is the danger of being affected by constructive notice of secret acts. Even the provision that the vendor's attorney shall prepare the conveyance is one which a cautious purchaser would be slow to assent to: for it may be viewed as constituting the vendor's attorney the purchaser's agent in the preparation of the conveyance, and may affect him with constructive notice. (g)

(v) Act IX of 1872, sec. 37. See also Act I of 1877, sec. 23.

(w) *Debia v. Debia*, 8 W.R., 101; *Ram Golam Dohy v. Ayma Begum*, 12 W.R., 177. [Naik, I. L. R., 5 Bom., 48. (P.C.)]

(x) See *Conserat v. Sadaburt Pershad Sahoo*, 3 W. R., 210; *Naik v.*

(y) *Bhala Nahana v. Prabhu Hari*, I. L. R., 2 Bom., at p. 73.

(z) *Fer PHEL, C.J., McArthur v. Kelsall*, 1 Taylor & Bell's Rep., at p. 188. See also *Hormaji Temulji v. Mankavurbai*, 12 Bom., 262—67; ante, p. 58.

DUTY OF VENDOR'S SOLICITOR.

1. The vendor's solicitor should first of all see that the contract for purchase is reduced into writing and signed by the parties. It is necessary that he should "procure the signature of the purchaser as soon as the terms of it are finally settled," more particularly where there are several purchasers, as some of them, either from subsequent reflection or the intervention of some unforeseen event, may be desirous of departing from the contract. An estate or houseagent to whom instructions are given to procure a purchaser for property, has not, though the price is named in the instructions, authority to enter into a binding contract with a purchaser to sell such property. (a)

2. Upon the contract for purchase being submitted to the vendor's solicitor for his approval, it will be for him to ascertain and describe with accuracy the exact interest which the vendor has in the land, the quit-rents, or other annual or gross payments or charges (if any) to which it is subject; the quality or legal nature of the estate, and the district or subdivision where it is situate.

3. Where the sale is by public auction, the vendor's solicitor should be prepared with a duly stamped agreement for the signature of the purchaser. (b)

PREPARATION OF ABSTRACTS OF TITLE.

It is not customary in India for vendors of immovable property to prepare abstracts of title for the convenience of purchasers. In the Mofussil the muniments of title or copies thereof are, as a rule, handed over by the seller to the buyer or his legal adviser for his perusal and examination. Under the Transfer of Property Act, the seller is bound to produce to the buyer on his request all documents of title relating to the property which are in the seller's possession or power. (c) In the Presidency-Towns of Calcutta, Bombay and Madras, abstracts of title are, however, frequently met with; and in the case of sales by the Court-Receiver, Administrator-General,

(a) *Hamer v. Sharp*, L. R., 19 Eq. 108.

(b) *Barton's F. in C.*, 3rd Ed., Vol. I. Introduction, pp. ii—v.

(c) Act IV of 1882, sec. 55, para (1), cl. (b).

Official Trustee and the Registrar of a High Court in the exercise of its ordinary original civil jurisdiction, abstracts of title are invariably prepared by attorneys, and submitted for the inspection of intending purchasers.

If the lands sold be of a different nature, being part revenue-paying or lakhiraj and part leasehold, the titles should be deduced by separate abstracts, inasmuch as different species of tenures are governed by distinct rules of law.

In Bombay it has been held that a purchaser cannot require more than a twenty-years' title; (d) and in the case of Hindus, enquiry as to the state of the vendor's title for a period of 12 years before purchase has been deemed sufficient. (e) The vendor's title, however, should be deduced from a period of at least 60 years past, because rights accruing subsequent to that period may generally be successfully asserted. As a general rule, the going back beyond a period of 60 years, should if possible be avoided, as it frequently discloses some dormant interest of which no account can now be given, and which, although not perhaps of a nature to authorize the purchaser to reject the title, yet often occasions much tedious discussions and delay, to the great inconvenience of the vendor. But wills, marriage articles, deeds creating long terms for years must be abstracted, although more than 60 years old. (f)

The title should commence with some deed or will in which no reference is made to any prior assurance. But where reference is made to any preceding instrument, such reference amounts in equity to constructive notice of the contents of the instrument referred to, and it will, therefore, probably be required, by counsel for the purchaser, to be abstracted, on the reasonable ground that it may disclose some fact prejudicial to the title. (g)

The recitals are often "a very material clue to the construction of the deed." (h) They often throw light on the state of the title. The substance of all recitals

(d) *Debi Ghela v. Jivraj Mukundas*, 2 Bom. H. C. Rep., at p. 433.

(e) *Savak Lal Karsandas v. Ora Nazumuddin*, 8 Bom. H. C. R., O. C., 77.

(f) *Barton's Precedents in C.*, 3rd Ed., Vol. I., Intro., p. xii. See *ante*, p. 52.

(g) *Ibid.*, Vol. I., Intro., p. viii.

(h) *Ibid.*, p. xvii.

should therefore be invariably set out in the abstract more particularly when the title-deeds do not go back to the requisite period of 60 years.

When a deed is made in pursuance of a power, or in execution of a trust or previous agreement in writing, the recital of such power or trust or agreement, should be fully set out, as the validity of the deed may depend upon its conformity to these previous instruments.

The particular operative or conveying words of every assurance should be always given in the abstract. The words of inheritance or limitation should be set out *verbatim*. A document which does not and has not affected the vendor's right to sell, need not be abstracted. (i)

The description of lands &c. is often materially altered by the erection of houses upon them, or by several parcels. fields being thrown into one, or one divided into two or more, and the like; this, when within the knowledge of the vendor's solicitor, should be particularly noticed in the abstract of title, as there will otherwise appear to be a want of identity in the parcels of prior and subsequent deeds, and some satisfactory evidence, *e. g.*, assessment-bills &c. should be furnished to verify the fact stated. (j)

The abstract, besides containing the substance of the title-deeds, in the mode above suggested, should also notice the execution and attestation thereof, and contain a statement of births, deaths, survivorships and other intermediate facts and events, as in any way relate to the deduction of title, or have a tendency to show the exact state of the vendor's interest.

DUTY OF PURCHASER'S SOLICITOR.

The purchaser or his solicitor should ask for the title-deeds or an abstract of the vendor's title on the day appointed for the delivery thereof or at least *soon* after the time stipulated. If he wish to avoid the purchase, he should, immediately after the expiration of the stipulated period, give notice to the vendor that he considers the contract to be at an end, and demand

(i) Prideaux, tit. on Abstract.

(j) Barton's Precedents in C., 3rd Ed., Vol. I., Introduction, pp. xix-xx.

repayment of the deposit money, if any were paid; for if he lie by and show an indifference about the vendor's performing his part of the contract at the time agreed upon, he will be construed to have waived his right to require it.

If any delay appears likely to take place on the part of the vendor in perfecting the title within a reasonable time after that stipulated for the payment of the purchase-money, the purchaser or his solicitor, in order to prevent the purchaser being chargeable with interest, should previously to the expiration of the time, give notice to the vendor or his solicitor that the purchase-money is ready and lying dead—i. e. idle or unproductive of interest. The vendor upon receiving such notice should endeavour to agree with the purchaser's solicitor for the investment of the purchase-money in government securities or some particular funds to be mutually agreed upon between them. (k)

REQUISITIONS UPON AND OBJECTIONS TO TITLE.

In the preparation of the requisitions upon and objections to the title, due notice must be taken of the restrictive stipulations contained in the contract; and though the purchaser's requisitions are seldom confined to what he is strictly entitled to call for, frivolous and untenable requisitions must not be tenaciously adhered to and persisted in, inasmuch as they indispose a Court from enforcing a contract at the suit of the purchaser. On the other hand a purchaser should be careful not to hold back important requisitions or objections; if he willingly does so, he may be held to have impliedly waived them. (l)

A purchaser may after contract either expressly or impliedly

Waiver of requisition. waive either wholly or in part his *prima facie* right to a good marketable title or, to the usual evidences thereof. (m) The taking possession of the property by the purchaser has, in the absence of any agreement to the contrary, frequently been held to operate as a waiver of objections to the title. (n)

(k) Barton's Precedents in C., 3rd Ed., Vol. I., Intro. p. xvi.

(l) Dart's V. & P., 5th Ed., pp. 428-29. (m) Dart's V. & P., p. 430.

(n) *Binks v. Lord Rokeby*, 2 Swanst. 222; *Haydon v. Bell*, 1 Beav., 387; *Calcraft v. Boeck*, 1 Ves. Jun., 221.

Acceptance of the title as deduced by the abstract is no waiver of objections not disclosed thereby and will not operate as a waiver of the purchaser's right to have the abstract verified. (o)

A client is not bound by his counsel's approval of a defective title.

REQUISITIONS USUALLY MADE ARE :—

- (1) Evidence as to the *identity* of the property sold.
- (2) Evidence as to the factum of a will or other testamentary document of former owner.
- (3) Evidence as to the intestacy of the vendor's ancestor and of the heirship of the vendor.
- (4) Whether the vendor was sole owner of the property or a mere co-owner with others, and the nature of his interest in the property.
- (5) Whether the vendor has made any settlement of the property in consideration of marriage affecting the subject of sale.
- (6) Whether there is any easement or servitude attached to the property or imposed upon the property.
- (7) Whether there is any lien or improvement loan affecting the property.
- (8) Whether there is any fact or circumstance not disclosed in the abstract, any rent-charge for dower or maintenance, or any incumbrance affecting the property.

Under the Transfer of Property Act, sec. 55, para. (1), clause (c) the vendor is bound "to answer to the best of his information all relevant questions put to him by the buyer in respect of the property or the title thereto."

Upon obtaining the vendor's replies to the requisitions on the title, it will be for the purchaser or his solicitor to consider whether they are satisfactory. "This is," says Mr. Greenwood, "a duty of almost equal importance to the perusal of the abstract, and sometimes more so as there may be greater difficulty in deciding whether an answer is sufficient, than in raising the question." (p) If the intending purchaser has any doubt as to the

(a) *Brown v. Stenson*, 24 Beav., 631.

(p) Greenwood's Practice of Conveyancing, 5th Ed., p. 34.

course to be pursued he should take the opinion of a counsel or other men learned in the law before completing his purchase or sending further requisitions to the vendor.

Upon receiving the abstract of the vendor's title, the solicitor for the purchaser must carefully examine it with the documents abstracted to see that their contents are fully and faithfully disclosed. In examining the parcels he should particularly attend to their identity with those agreed to be purchased, for which purpose the parcels of every deed must be read over and compared. The consideration for the deed should be noticed and the execution and attestation thereof duly inspected. He must also recollect, whilst examining the abstract, to read the recitals; and inspect the covenant for quiet enjoyment against incumbrances, as it sometimes happens that incumbrances are recited or noticed by way of exception in the covenant for quiet enjoyment, which do not appear in any other part of the deed. Finally, the solicitor for the purchaser must see whether the several assurances are duly stamped and registered according to the law.

The purchaser or his solicitor having examined the abstract with the title-deeds, should ascertain by search at the Registry Office and in Courts of Justice where the property is situate, whether there are any mortgages, decrees and other incumbrances affecting the estate.

The purchaser or his solicitor must, lastly, require evidence to be produced of all such statements in the abstract, of marriages, deaths, intestacies, heirships, &c. &c. as are essential to perfect the deduction of title. Some deduction of pedigree is necessary to make a title as heir to a deceased ancestor. A pedigree may be supported by horoscopes, entries in almanacks and an affidavit of intimate relatives and neighbours.

In England, proof of the possession of land or of the receipt of rent from the person in possession is *prima facie* evidence of a seisin-in-fee. In India the proof of the possession or receipt of rent by a person who pays the land-revenue immediately to government is *prima facie* evidence of an estate of inheritance in the

case of an ordinary zamindari. The evidence is still stronger if it be proved that the estate has passed, on one or more occasions from ancestor to heir. (g)

The mere fact of a person's name being registered in the Collector's books is no evidence of title; and a purchaser from such a registered person would not be justified in relying upon the fact of such registration, as sufficient to entitle him to treat the recorded owner as the real owner. (h)

A purchaser made the following requisition: "Is there to the Inquiry as to knowledge of the vendors or their solicitors any incumbrances. settlement, deed, fact, omission or any incumbrance affecting the property not disclosed by the abstract?" *Held* on appeal, that neither the vendors nor their solicitors were bound to answer any part of the requisition (i) "I am of opinion," said Lord Justice James, "that the question put by the purchaser is anything but a requisition; it is a searching interrogatory put to the vendors and their solicitors.....The practice of asking such a question is of modern growth, and the introduction of new-fangled requisitions of this kind is dangerous and ought to be discouraged, as tending to increase the expence and delay in the investigation of title, which already are almost a disgrace to the law of the country. In the present case the enquiry goes on to ask after 'any fact or omission affecting the property.' 'Is a vendor to be expected to remember every restrictive covenant to which the property is subject'? What is the good of such an enquiry? Every solicitor knows that he is subject to civil and criminal responsibility if he wilfully suppresses matters prejudicially affecting the title. This is a new practice for which there is no authority, and I am of opinion that the purchaser's application ought to have been refused with costs. The vendors will have the costs of the

(g) *Per* SIR BARNES PEACOCK, *Collector of Trichinopoly v. Lakamani*, 14 B.L.R., at p. 139. (P.C.) See *ante*, Chap. III, sec. 2, pp. 119—120.

(h) *Varden Seth Sam v. Luckpathy Roy v. Lalla*, 9 M.I.A., 323; *Amir-unissa Bibi v. Woomarodeen Chowdhry*, 14 W. R., 50. See *ante*, p. 54.

(i) *In re Ford and Hill*, L.R., 10 Ch. D., 365,

'appeal.' Lord Justice Bramwell observed : "Suppose that the vendor refuses to answer this requisition, and the purchaser thereupon refuses to complete and brings an action for his deposit. He would have to make out a breach of contract, and for that purpose must establish that the vendor had refused to answer a question which it was his duty to answer, or that a good title had not been shown. He could not make out either of these points. There is no duty to answer such a question." Lord Justice Bagallay added : "The establishment of a right to have an answer to such inquiries would lead to a loose way of transacting business. A solicitor may say to himself, 'I need not be particular about making any abstract complete, for there will be a requisition asking whether it is so, and that will give an opportunity of supplementing it.' Such a course of practice would not only increase expence, but cause additional obstacles in the way of investigating titles." (t)

Section O.—Assignment of Contract for Purchase.

P, a vendor agreed to sell a piece of land to M with immediate possession, the purchase to be completed in five years and interest on purchase-money being paid until completion. Before completion M agreed to sell the land to C subject to the provisions of the contract with P, the vendor, and the agreement was registered in the district registry, with a receipt for part of the consideration-money which C had laid out for M in buildings on the land. C offered to pay P, the vendor, the amount agreed upon between him and M, and applied for the delivery of the abstract, but the vendor refused to convey to him the land in question unless he would purchase other land also agreed to be sold to M, and shortly afterwards the vendor and M conveyed the land to H. On a bill filed by C against P, the vendor, M, and H, alleging that H, had constructive notice

(t) In re *Ford and Hill*, L.R., 10 Ch. D., 369—72.

of his title, and praying a conveyance of the estate, it was held, that, whether H had such notice or not, the conveyance to him could not be set aside. (u)

A notice to the vendor of an estate that the vendee had deposited the contract with a third party A, and has entered into an agreement with A, to make to A "a valid assignment" of the contract, does not bind the vendor to make inquiry whether the agreement between the vendee and A has been carried into effect; nor will it compel the vendor to refuse to execute the conveyance to the vendee, who, upon the payment of the purchase-money demands the conveyance, or even excuse the vendor for making such a refusal. The persons who claim to have the benefit of the assignment must give distinct notice to the vendor of their *claim*, and of their *readiness* to put themselves in the vendee's position for the completion of the contract. F entered into a contract with P to sell him some leasehold property. P paid part of the purchase-money and obtained from F a lease of the premises for a short term of years in favor of a nominee of P. P had dealings with bankers, to whom he became much indebted. Being called on to give the bankers some security he handed to them the title-deeds of a freehold estate, which he charged with the debt, and at the same time he deposited with them his contract for the purchase of the leasehold property. He accompanied this deposit with a written memorandum in which he agreed to make to the bankers "a valid assignment of my contract with F for the purchase of" the leasehold premises, "by way of mortgage for further securing &c." The bankers by their solicitors sometime afterwards gave to F notice (in the above words) of this agreement and the solicitor's letter called it "a charge by P on his purchase." F acknowledged the receipt of this notice. *He heard nothing more of the matter.* P did not complete his purchase at the stipulated time, but did so afterwards, and then F according to the terms of the original

(u) *Crabtree v. Poole*, L.R., 12 Eq., 13.

contract, executed to him a conveyance of the leasehold premises without any notice being taken in the conveyance of the claims of the bankers: It was held, that the rule of equity, that a vendor of an estate is, after the making of the contract of sale, a trustee for the purchaser, did not apply to this case, and that F was in no way liable to the bankers. (r)

Section 10.—Of Injunctions pending Contract.

When a vendor sells to A, and then sells to B with notice, and B does some act to interfere with A's right, the Court will restrain B as well as the vendor. (w)

An injunction can be granted to stay a sale by a settlor of immovable property in derogation of his voluntary settlement thereof. (x)

The Court has no jurisdiction to restrain a mortgagee from selling under his power of sale, provided he keeps within the terms of the power, and no case of fraud can be made out. Unless there be fraud or special contract, a mortgagee will not be restrained from selling. (y)

Upon bill filed by a creditor against the executors, heir, and purchaser of real estate charged with the payment of debts, an injunction was granted to restrain the purchaser from paying the purchase-moneys to the heir upon whom the estate had descended. (z)

A purchaser who has obtained possession before payment of the purchase-moneys may be restrained by an injunction from cutting timber, pulling down houses, or committing other waste thereby diminishing the value of the property sold. (a)

(v) *Shaw v. Foster*. *M'Creight v. Foster*, L.R., 5 Ch. 604; 5 H.L., 321.

(w) *Goodwin v. Fielding*, 4 D.M. & G., 90.

(x) Act I of 1877, sec. 54, Illus. (y) [pp. 312, 351.

(y) *Cockell v. Bacon*, 16 Beav., 158. For Indian cases, see *ante*,

(z) *Green v. Lowe*, 3 Bro. C.C., 217.

(a) *Crockford v. Alexander*, 15 Ves., 138, *Petley v. The Eastern Counties Railway Co.*, 8 Sim., 483.

A purchaser under a decree does, by the act of purchase, submit himself to the jurisdiction of the Court as to all matters connected with that character. If he has not paid his purchase-money into Court, he may upon application be restrained by an injunction of the Court from felling, topping, or removing any timber or other trees or underwood from the premises, and also from making bricks, tiles, or pipes thereon, and from committing any waste, spoil or deterioration thereof. (b)

The beneficiary has a right to restrain his trustee "from committing any contemplated or probable breach of trust." (c) A is a trustee of certain land, with power to sell the same and pay the proceeds to B and C equally. A is about to make an improvident sale of land. B may sue on behalf of himself and C for an injunction to restrain A from making the sale, (d) even though compensation in money would have afforded adequate relief. (e)

A sale of lands will be restrained on an interlocutory motion, where, although the conveyance is absolute on its face, there are probable grounds of belief that it was intended only as a mortgage. (f)

The Court will restrain the sale of property upon an agreement made by defendants which would be a violation of the duty of the defendants to the plaintiff. (g) And vexatious alienations *pendente lite* will be restrained. (h)

However large may be the powers of trustees under their trust-deed to introduce conditions limiting the title, and special conditions which have or are calculated to have, a depreciatory effect on the sale, they are bound to exercise them in a reasonable, and proper manner. They must not rashly and improvidently introduce a depreciatory condition, for which there is no necessity or justification, and the Court will at the suit of a

(b) *Casamijor v. Strode*, 1 Sim. & St., 381.

(c) *Dance v. Goldingham*, L.R., 8 Ch., 902.

(d) Illus. (b) to sec. 61, Indian Trusts Act (II of 1882).

(e) Act I of 1877, sec. 54, Illus. (f).

(f) Joyce's Principles of Injunctions, p. 128.

(g) *Hawes v. James*, 1 Wils., 2.

(h) *Daly v. Kelly*, 4 Dow., 440. *Nanabhai v. Nagarkar*, I. L. R., 2 Bom., 252. See also Act XIV of 1882, sec. 492.

cestui que trust, restrain the trustees and a purchaser from completing a sale made under such conditions. (i) So it will restrain the re-selling of premises under the conditions of a prior sale, where the plaintiff has a right to specific performance of a contract, freed from a liability, *e. g.*, an easement attempted to be forced upon him by the vendor. (j)

Where the owner of several houses in a large square in London, and of all the grounds forming the square, sold the garden in the middle of the square with a covenant that the purchaser and his assignees should use the land as a garden, and not build thereupon, the covenant was enforced by means of an injunction against a subsequent purchaser with notice, who was proceeding to build upon the land. (k) Similarly a covenant not to build so as to obstruct a particular view, a river or sea view, will be enforced upon the broad principle that a party shall not be permitted to use the land in a manner inconsistent with the covenant made by his vendor, and with notice of which he purchased. (l)

Where part of the subject-matter of contract is abstracted by the vendor *pendente lite*, the Court will give relief ; *e.g.* where the vendor pending a suit for specific performance cuts down and removes valuable Mahogany, Sal, Mangoe or other fruit-trees and ornamental timber. (m)

The Court, in granting an *ad interim* injunction, will first see that there is a *bonâ fide* contention between the parties, and then on which side, in the event of obtaining a successful result to the suit, will be the balance of inconvenience if the injunction do not issue, bearing in mind the principle of retaining immovable property *in statu quo*. (n) On these principles an injunction was granted to restrain the defendants from "selling, alienating, or otherwise disposing" of certain houses, the subject of a suit,

(i) *Dance v. Goldingham*, L.R., 8 Ch., 902, 909.

(j) *Russel v. Harford*, L.R., 2 Eq., 527.

(k) *Tulk v. Moxhay*, 2 Phill., 774.

(l) *Jay v. Richardson*, 30 Beav., 563 ; *German v. Chapman*, L.R., 7 Ch. D., 271. See also Collett's Law of S. Relief in India, p. 281.

(m) See *Nelson v. Bridges*, 2 Beav., 244. Also sec. 492, Act XIV of 1882.

(n) *Gomes v. Carter*, 1 Ind. Jur., N.S., 411. See also *Monmohini Dassi v. Ichamoyee Dassi*, 13 W.R., 60.

in which the plaintiff claiming them as trust property under the will of his father sought to set aside proceedings in execution taken by an executor (under whom the defendants claimed) after the death, but before the grant of probate of the will of the testator, and by which proceeding, the executor had seized the houses in satisfaction of his own debt, and purchased them himself for Rs. 16,000. - The defendants, representatives in title of the executor, had contracted to sell the property to one Manikjee Rustomjee for Rs. 50,000. Mr. Justice Phear in granting the injunction observed :—" Here, no doubt, there is a *bonâ fide* contest, and the balance of inconvenience would be decidedly on the side of the plaintiff should he succeed, if the defendants are not restrained from completing the conveyance. This order of the Court would probably protect the defendants from any suit for specific performance by Rustomjee." (o)

Where the purchaser of a coal mine sued to rescind the contract on the ground of fraud, but it was essential to its existence that the mine should be kept in a going state and the purchaser was in possession, on the application of the purchaser, a receiver and manager was appointed pending the suit, the costs thereof to abide the result. (p)

Where an agreement was entered into by A for the sale of an estate to B, to be completed and the purchase-money paid within five years, and interest half-yearly in the meanwhile, with power to the vendor to re-enter if the interest was in arrears for twenty-one days; and C advanced money to B on a mortgage of B's interest, and A agreed verbally with C to extend the term for the payment of half-yearly interest; and the interest being in arrears, so that A was entitled to re-enter under the agreement with B, but not under that with C, A had re-entered. A receiver was appointed on the application of C. (q)

(o) *Gomes v. Carter and others*, 1 Ind. Jur., N. S., at p. 412.

(p) *Gibbs v. David*, L.R., 20 Eq., 373. See sec. 44, Act I of 1877.

(q) *Dawson v. Yates*, 1 Beav. 301. See also *Joynarain Geeree v. Shub-pershad Geeree*, 6 W. R., Mis. 1; *Mormohini Dassi v. Ichamoyee Dassi*, 13 W.R., 60. (PHEAR & E. JACKSON, J. J.)



TO

The Honourable Sir Richard Garth, Kt.,

CHIEF JUSTICE OF HER MAJESTY'S HIGH COURT OF JUDICATURE
AT FORT WILLIAM IN BENGAL,

This Book

IS

WITH HIS PERMISSION

RESPECTFULLY DEDICATED.

PREFACE.

It is rather strange that there is no work on the Law and Practice relating to Vendors and Purchasers of Immovable Property in India. This, however, may be accounted for by the fact that many in the profession have no time to spare and few will take the trouble to collect the precedents into one point of view from "the wilderness of single instances"—the Case-law of India.

The plan and purpose of the treatise is to fill up this gap among the text-books on Indian Law. It is not meant to be anything more than a compilation for those who want to have a general insight into the Principles of the Law of Real Property so far as they concern the law and practice relating to Vendors and Purchasers. The author's principal aim has been to produce such a practical book as may be of use to law students and noviciates in the profession as well as to land-owners, capitalists and managers of zamindaries, who have constantly to deal in the sale, purchase or mortgage of estates and interests in immovable property. To obviate errors and imperfections in the exposition of the principles of the law on the subject, the author has used the *ipsissima verba* of the various learned judges who decided the cases to which reference is made, and has further given abstracts of a few of the leading English cases on conveyancing and equity for the convenience of readers. In addition to Indian cases, some decisions by the Privy Council and the House of Lords have been given to enable the reader to realise the extent to which the principles of English law and equity have been applied and adopted in the determination of Indian cases.

The comprehensive genius of Mr. Whitley Stokes has compressed the Law as to Sales of Immovable Property within the compass of nine or ten sections of the Transfer of Property Act, 1882. However invaluable the sections may be as

authoritative enunciations of some legal principles, they do not constitute the whole law on the subject ; and practical experience in Court and Chamber will show the fragmentary character of the enactment. The main provisions of the Act have been referred to or embodied in the text, while a reprint of the whole Act with the author's annotations has been added as an appendix.

For the omissions and errors in the execution, the writer "throws himself upon the candour of the learned and liberal profession to which he has the honour to belong." The subject was an extensive one, and required far greater talents than the author can lay claim to, to treat it in an exhaustive manner ; but if he shall have succeeded in doing justice to the superior abilities of the eminent Indian Judges whose names appear almost in every page, he shall in some measure have attained the object of his wishes. Whether the author is deceived in his expectations as to the utility and necessity of such a work or as to his own capacity in undertaking it, he must leave the impartial public to judge ; but in submitting it for the indulgent support of lawyers and laymen, the reader need hardly be assured that the author has been actuated by a sincere desire that it may prove useful to both, and that whatever its defects and demerits may be, neither time nor trouble has been spared to make the book as complete in its kind as the present state of Indian case-law allowed.

The writer's obligations to various authors for assistance derived from their labours are acknowledged in the foot-notes. The reader's attention is drawn to the head-notes of every page.

70, RUTTON SIKKAR'S GARDEN STREET, }
CALCUTTA, THE 31ST OF JUNE, 1883. }

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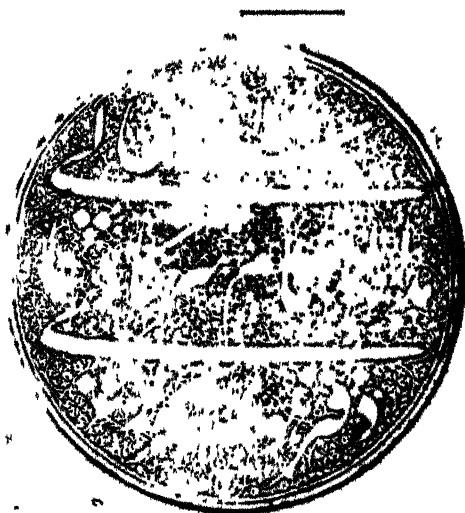


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